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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 502

U. S. Supreme Court, U. S.  
FILED.

OCT 1 1913

JAMES F. McKEWNEY,  
Clerk.

THE SAN JOAQUIN AND KING RIVERS  
CANAL AND IRRIGATION COMPANY  
INCORPORATED (a corporation),

*Appellant,*

*vs.*

THE COUNTY OF STANISLAUS, in the  
State of California, et al.,

*Appellees.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF CALIFORNIA.

## BRIEF FOR APPELLANT

GARRET W. McKEWNEY,

FRANK H. SHORT,

EDWARD F. TRADWELL,

*Solicitors for Appellant.*

ALDEN B. BROWNE,

ALEXANDER BRITTON,

*Of Counsel.*

(23,297)

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| 2. Headworks, stop-gates, outlet gates, bridges, weirs, station-houses, etc., etc., reproduction cost in 1907 (Rec. p. 77).....  | 315,515.14                   |
| 3. Rights of way for canals.....   | 144,119.00                   |
| 4. Real Estate:  |                              |
| At headworks (Rec. p. 84).....   | 1,568.80                     |
| At Quinto Sectionhouse.....  | 7,700.00                     |
| At Los Banos (Rec. p. 84).....   | 600.00                       |
| 5. Personal Property (Rec. p. 84).....   | 8,930.84                     |
| 6. Interest on investment during construction, to-wit: 7% for one year on \$907,929.06   |                              |
| the reproduction cost (Rec. p. 84)   | 63,555.03                    |
| 7. Fund for operating expenses (Rec. p. 84).....   | 20,000.00                    |
| Total reproduction cost.....   | \$991,484.09                 |
| 8. From the present cost of structures, viz.: \$315,515.14   |                              |
| is deducted 30% for depreciation (Rec. p. 77)  | 94,654.54    94,654.54       |
| Leaving present value (Rec. p. 87)   | \$220,860.60    \$896,829.55 |
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*Court Complainant*

|   |              |                |
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| Value of property on which a return should be allowed | \$896,829.55 | \$2,070,072.95 |
| Receipts  | 136,697.35   | 136,697.35     |
| Return at 6%  | 53,809.77    | 124,204.37     |
| Maintenance   | 65,657.96    | 86,890.40      |
| Depreciation  | 12,748.08    | 12,748.08      |
|   | <hr/>        | <hr/>          |
|   | \$132,215.81 | \$ 223,842.85  |

|                    |             |              |
|--------------------|-------------|--------------|
| Surplus or Deficit | \$ 4,481.54 | \$ 87,145.50 |
|--------------------|-------------|--------------|

|                               |       |
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|  |              |
|--|--------------|
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|  | <hr/>        |
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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

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No. 303.

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THE SAN JOAQUIN AND KINGS RIVER CANAL  
AND IRRIGATION COMPANY INCORPORATED,

*Appellant,*

vs.

THE COUNTY OF STANISLAUS, IN THE STATE  
OF CALIFORNIA, ET AL.,

*Appellees.*

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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## BRIEF FOR APPELLANT.

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### HISTORY OF CASE.

This case is connected with a case bearing the same title which was before this court and the decision in which is reported in 192 U. S. 201, 24 Sup. Ct. Rep. 241, 48 L. Ed. 406, and it will be proper to state the general features of that case preliminarily to a consideration of the case at bar. The former case was a suit to have declared invalid an ordinance of the Board of Supervisors of the County of Stanislaus, State of



California, establishing rates at which complainant might sell water to the inhabitants of that county. Among other things it was contended by complainant in that case that it was operating in three counties, namely, Stanislaus, Merced and Fresno, and that if the other two counties should establish rates on the same proportionate basis as those established by Stanislaus county, having due regard to the distance the water was carried, complainant would not receive a just or any income. But this court held that the other two counties had not in fact established any rates and until they did so the rates established in Stanislaus county (\$1.50 per acre) must be judged on the theory that the same rate was collected in all three counties, and the court said:

"Hereafter, in case the other counties should fix rates in such manner that, taken as a whole, the rates in the three counties would not insure an income of at least 6 per cent., as provided for in the act of 1885, the company would, of course, not be bound to accept such rates and a decree in this case would not bind it in regard to the propriety of rates for the future as fixed by the ordinance of 1896 for the county of Stanislaus."

The other two counties were not slow to take advantage of the suggestion. This decision was rendered in 1903 and in 1904 the County of Merced established the rate of \$1.08 per acre (Rec. p. 6), and in the same year the County of Fresno fixed the rate at 62½ cents per acre (Rec. p. 6). In 1907 the County of Stanislaus re-established the rate at \$1.50 per acre (p. 8), the County of Merced fixed the rate at \$1.65 per acre (p. 9), and the County of Fresno at 85 cents per acre (p. 10). It should be observed that the complainant's canal takes out in Fresno county and runs first through that county, then through Merced county and then

into Stanislaus county. In carrying water to Fresno county 12% is lost by seepage and evaporation, to Merced 33% and to Stanislaus 53% (Trans. pp. 4, 548). For this and other reasons which are apparent the rates in the lower counties should be higher than in the upper counties, the carriage of water being analogous to the carriage of freight and passengers (163 Fed. 567).

The present suit involves the validity of the rates for the year 1907, which were established by the Board of Supervisors as follows:

| <i>County</i>    | <i>Value of Property</i> | <i>Operating Expenses</i> | <i>Rate</i>    |
|------------------|--------------------------|---------------------------|----------------|
| Fresno .....     | \$ 116,250.00            | \$21,750.00               | \$.85 per acre |
| Merced .....     | 750,000.00               | 37,000.00                 | 1.65 per acre  |
| Stanislaus ..... | 335,456.32               | 35,000.00                 | 1.50 per acre  |
|                  | <hr/> \$1,201,706.32     | <hr/> \$93,750.00         |                |

It should be noted that the rate fixed by Stanislaus county is less than that fixed by Merced county, although the water must be carried through Merced county to reach Stanislaus county. Each one of the ordinances assumed to fix the value of the property of the company "used by complainant for, and useful to, the furnishing of water to the inhabitants of said county," and the act under which the boards acted contemplated that each county should fix the value of such property and the rate (Stats. of Cal. 1885, p. 95) and we construe this to mean, in a case where the plant is in several counties, each board should determine what proportion of the plant is useful to it. Fresno county obviously worked on that theory, but whether the other boards did or not can only be determined from the language above quoted. Stanislaus county's valuation is much lower than that of Merced, although

that county is lower on the canal. It either, therefore, was fixing the value of *its proportion* of the entire system or made a valuation much lower than Merced county. On the other hand, if these valuations were intended as the value of the proportion of the property useful to each county, then the aggregate value would be about the value of the tangible property claimed by complainant and much greater than the value claimed by defendants on the trial. The same is true of the operating expenses. Another thing to be noticed about these ordinances is that in 1896 the County of Stanislaus fixed the value at \$337,000 and in 1907 at \$335,456.32, or somewhat less, although, as we shall show, it was generally admitted that the cost of reconstruction in 1907 was approximately double the cost in 1896 owing to the increased cost of labor and materials. We have called the attention of the court to these matters, which are important in determining what presumption is to attach to the ordinances, but doubtless the controlling question before this court is the adequacy of the return on the real value of the property, and not on the value as fixed by the boards.

#### VALUATION OF PROPERTY.

The case was referred to a standing master as referee, who made findings as has been recommended by this court. Exceptions to the findings were filed by defendants, but those exceptions were all withdrawn, so that defendants cannot on this appeal rely on any of the contentions which they made and which were found against them. We shall not refer to any such matters and presume that appellees will not do so either. Complainant also excepted to certain findings and to a certain extent those exceptions were sustained, but in the main the master's report was con-

firmed. The following shows the property owned by complainant and the value thereof as found by the master's report as finally approved by the court:

|   |              |
|---|--------------|
| 1. Main Canal, Outside Canal, Dos Palos Colony Canals and minor canals requiring the excavation of 5,367,768 cubic yards of material (Rec. p. 68), at 8 cents per cubic yard (Rec. p. 72).....  | \$429,495.28 |
| 2. Headworks, stop-gates, outlet gates, bridges, weirs, station-houses, etc., etc., reproduction cost in 1907 (Rec. p. 77)....  | 315,515.14   |
| 3. Rights of way for canals.....  | 144,119.00   |
| 4. Real estate:   |              |
| At headworks (Rec. p. 84).....  | 1,568.80     |
| At Quinto Section-house.....  | 7,700.00     |
| At Los Banos (Rec. p. 84).....  | 600.00       |
| 5. Personal Property (Rec. p. 84).....  | 8,930.84     |
| 6. Interest on investment during construction, to-wit: 7% for one year on \$907,929.06, the reproduction cost (Rec. p. 84).....   | 63,555.03    |
| 7. Fund for operating expenses (Rec. p. 84).....  | 20,000.00    |
| <hr/>   |              |
| Total Reproduction Cost.....  | \$991,484.09 |
| 8. From the present cost of structures, viz. ....   | \$315,515.14 |
| is deducted 30% for depreciation (Rec. p. 77)...  | 94,654.54    |
| <hr/>   |              |
| Leaving present value   |              |
| (Rec. p. 87).....   | \$220,860.60 |
|   | \$896,829.55 |
| 9. Complainant alleged that it was the owner of valuable water rights of the value of upwards of \$760,000 (Rec. p. 3) and the court found that its water rights were of the value of \$900,000 to \$1,000,000 (Rec. p. 102). The court, however, held that no return |              |

should be allowed upon the water rights owned by the company, and this presents one of the most important points of the case.

10. Complainant also attempted to show and contends that it did show that the earthwork in its canals had appreciated by the lapse of time, being now well sodded and not subject to washouts, being silted so as to reduce seepage to a minimum and the banks being worked into a road which can be traveled from one end of the canal to the other. The appreciation due to the saving of water alone was estimated at \$129,365.00 (Rec. p. 90). The master held that this form of "appreciation" was proper and should be added to the reconstruction cost in fixing the present value, in the same manner that "depreciation" in structures is deducted from the reproduction cost; but held that the party who testified to the value of this appreciation did not possess the proper qualifications to permit him to testify in the matter (Rec. pp. 146-157).

11. Complainant also contended that it should be allowed an additional value to its right of way owing to the fact that, if it now acquired it, it would be compelled to pay the expense of fencing the same, whereas it now holds it freed of that obligation. The cost of such fencing would be \$42,471.00 (Rec. p. 599). But this claim was disallowed (Rec. p. 86).

12. As has been noted, the court only allowed 8 cents per cubic yard for excavation, including engineering and general superintendence, which all agree amounts to 10 per cent. This would make the amount allowed for actual excavation only 7.27 cents per cubic yard. We shall show that even the defendant admitted that it would cost substantially that amount in 1896 and that the increased cost of labor and materials in 1907 required an allowance of about 10 cents per cubic yard. We, therefore, claim that the earthwork was

worth \$575,730.95 instead of \$429,495.28, as found by the court.

13. The court found in favor of the accuracy of our detail of structures, but made a horizontal reduction of 30 per cent. from our estimate of the cost of reproduction, largely if not entirely because of the claim that some of the canals and structures had been constructed for less about 1898. This we will show was due partly to a serious error of the master and partly to the low cost of labor and materials in that year and that the cost in 1907 was \$420,686.87 instead of \$315,515.14, as found by the court.

14. It will be seen, therefore, that we claim that to the valuation of the company's property, upon which the court allowed us a return, viz., \$896,829.55 should be added the following:

|   |                |
|---|----------------|
| Value of water rights.....                          | 760,000.00     |
| Additional reproduction cost of<br>excavation ..... | 146,235.67     |
| Additional reproduction cost of<br>structures ..... | 105,171.73     |
| Appreciation of earthwork.....                      | 129,365.00     |
| Cost of fencing right of way.....                   | 42,471.00      |
| <hr/>   |                |
| Total value.....                                    | \$2,080,072.95 |

#### INCOME.

The rates were actually in force a year before the trial. In the year 1907-8, during which these rates were in force, the court charged the company with the following receipts:

|   |              |
|---|--------------|
| 1. For the irrigation of 93,003.35 acres<br>at the established rates.....   | \$125,782.37 |
| 2. For waste or surplus water dis-<br>charged on 20,000 acres of wild unculti-<br>vated land of Miller & Lux..... | 10,000.00    |

|                               |                     |
|-------------------------------|---------------------|
| 3. Interest and Discount..... | 163.48              |
| 4. Rent .....                 | 751.50              |
| Total .....                   | <u>\$136,697.35</u> |

An analysis of this income shows:

1. Under certain contracts with Miller & Lux made in 1871 that company was entitled to a special rate where it only irrigated its land once a year. This rate was less than the rates established by the Board of Supervisors in some cases and the loss of the company in the year 1907-8 was \$4,108.65, which the court charges against the company in the same manner as if it had been actually received. Of course, we fully understand that the validity of the rates must be determined on the assumption that they apply to all uniformly and we are, therefore, properly charged with the receipt thereof. But what we do claim is that it is unfair to charge the company with the sum it must annually lose by reason of this concession to Miller & Lux and at the same time allow the company no return on the water rights which it acquired in part in consideration of that concession.

2. In the same way the company is charged with \$10,000.00 for waste or surplus water discharged upon the wild, uncultivated lands of Miller & Lux, although it was not received and never can be collected by the company, but under the terms of the contracts Miller & Lux are entitled to that water. The additional appropriation of 350 cubic feet of water for the outside canal was expressly made in consideration of the recognition of this right and the right itself was clearly inferred from the earlier contracts. If this should be held to be a burden placed upon our water rights which should be charged against us, it in no way differs from an annual payment for such water rights. We should, of course, stand the payments as part of our invest-



ment, but we should be allowed a return on the water rights which we obtained in consideration thereof.

3. On the trial there was another dispute as to whether certain lands of Miller & Lux were irrigated with waters belonging to the canal company for which it should receive the established rate, or with water belonging to Miller & Lux and carried by the company, which resulted in charging the company with \$13,349.56 more than the company actually received. While we feel that we were right in that matter, it involves intricate questions of fact, including measurement of water, duty of water and such matters, which we can hardly ask this court to review, so we shall not reopen that question in this court.

#### MAINTENANCE.

The amount of money actually expended by complainant for maintenance in 1907-8 and the amount allowed by the court in passing on the validity of the rates established were as follows:

|   | Actually<br>Expended | Allowed     | Loss        |
|---|----------------------|-------------|-------------|
| Canal cleaning.....                       | \$15,760.44          | \$ 6,074.23 | \$ 9,686.21 |
| Damage Claims .....                       | 192.28               | 192.28      |             |
| Dredge Operating....                      | 1,309.35             | 1,309.35    |             |
| Expense, General.....                     | 2,034.98             | 2,034.98    |             |
| Expense, Automobile                       | 1,343.29             | 1,343.29    |             |
| Expense, S. F. Office                     | 440.64               | 440.64      |             |
| Horses and feed.....                      | 3,548.02             | 3,548.02    |             |
| Household furniture                       | 233.48               | 233.48      |             |
| Instruments and of-<br>fice fixtures..... | 143.40               | 143.40      |             |
| Labor .....                               | 11,034.05            | 11,034.05   |             |
| Legal Expense.....                        | 18,407.54            | 11,721.31   | 6,686.23    |

|                                     |             |             |             |
|-------------------------------------|-------------|-------------|-------------|
| Lumber and Piles....                | 822.08      | 822.08      |             |
| Rent, S. F. Office....              | 800.00      | 800.00      |             |
| Irrecoverable accts....             | 378.29      | 378.29      |             |
| Repairs at head-<br>works .....     | 1,574.86    | 1,574.86    |             |
| Repairs at section-<br>houses ..... | 597.20      | 597.20      |             |
| Re-surveying and<br>mapping .....   | 2,373.49    | 2,373.49    |             |
| Salaries .....                      | 6,929.49    | 6,929.49    |             |
| Subsistence .....                   | 4,276.22    | 4,276.22    |             |
| Taxes .....                         | 8,319.44    | 8,319.44    |             |
| Telephone .....                     | 282.17      | 141.08      | 141.09      |
| Tools and Machinery                 | 21.93       | 21.93       |             |
| Vehicles and harness                | 571.16      | 571.16      |             |
| Wood .....                          | 148.50      | 148.50      |             |
| Corporation License                 |             |             |             |
| Tax .....                           | 488.10      | 488.10      |             |
|                                     | <hr/>       | <hr/>       | <hr/>       |
|                                     | \$82,030.40 | \$65,516.87 | \$16,513.53 |

#### 1. CANAL CLEANING.

No question was made as to the fact that the amount of money claimed for canal cleaning was actually and necessarily expended in the year 1907, but the court only allowed the "average" amount expended during a long period of years. We claim that the law demands that the rate be fixed so as to allow us our actual expenditures, and that the average amount during a long period of years is not a proper basis, especially in view of the fact that the acreage irrigated, the extent and value of the canals, and the cost of labor and materials have doubled during that period.

It cannot be denied that there were a number of items, including the company's earnings, that, for the year in question, were largely in excess of any average that could be estimated for any considerable period of years. Consequently, we claim that it is not equitable to select one item of expense and average that over a long period of years, without applying the same principles, and where proper the same practice, to other items, both of earnings and expense.

## **2. LEGAL EXPENSES.**

The court also upheld the propriety of all the items of legal expense, but in the same manner only allowed us the average amount during a long period of years. This is subject to the same consideration as the item of canal cleaning. The attacks upon the company's rights have been increased in recent years and the expense has steadily increased. The effect of the decision is to compel the company to fight for and litigate the title to its water rights, and allows only a part of its expenditures necessarily made in that behalf; allows nothing for the value of such water rights, and, as stated, only a part of the actual cost of defending the same.

## **3. ADMINISTRATION.**

The court allowed our general salary account, but the evidence shows that it should have allowed an additional amount due to these facts: In the early history of the company it was not in any way controlled by Miller & Lux and at that time its general annual salaries were as follows:

|                       |            |
|-----------------------|------------|
| President .....       | \$1,500.00 |
| General Manager ..... | 2,400.00   |
| Secretary .....       | 2,400.00   |
| Engineer .....        | 2,400.00   |
|                       | <hr/>      |
|                       | \$8,700.00 |

In 1878 the company came under the control of Miller & Lux, and the officers of that company became its officers at the following annual salaries, which are still in force:

|  |            |
|--|------------|
| President .....                          | \$1,200.00 |
| Vice President and General Manager ..... | nil        |
| Secretary .....                          | 1,800.00   |
| Engineer .....                           | 840.00     |
|  | <hr/>      |
|  | \$2,840.00 |

(See Rec. p. 519.)

Since that time the company's business and property have more than doubled. As the defendants are eager to charge the company with every disadvantage suffered by its relations with Miller & Lux, it should be entitled to credit for anything saved by that relation, and it should be entitled to at least the salaries which were in vogue before that relation commenced. This would add \$1,860.00 to the maintenance cost. We, therefore, claim the following additional items of maintenance:

|                      |             |
|----------------------|-------------|
| Canal Cleaning ..... | \$ 9,686.21 |
| Legal Expense .....  | 6,686.23    |
| Salaries .....       | 4,860.00    |
|                      | <hr/>       |
|                      | \$21,232.44 |

## 4. DEPRECIATION.

We claimed a fund to meet the depreciation of structures in the annual sum of \$12,748.08. On preliminary injunction this claim was upheld (163 Fed. 567), but the master refused to allow it because we included two items of replacement in our maintenance account. These, however, we withdrew and the court upheld our right to this sum to meet depreciation, so that this matter is settled in our favor.

## 5. SUMMARY.

The relative nature of the amounts allowed by the court and the amounts claimed by us before this court are therefore as follows:

|   | Court            | Complainant      |
|---|------------------|------------------|
| Value of property on which a return should be allowed | \$896,829.55     | \$2,070,072.95   |
| Receipts .....  | 136,697.35       | 136,697.35       |
| Return at 6%.....                                     | 53,809.77        | 124,204.37       |
| Maintenance .....                                     | 65,657.96        | 86,890.40        |
| Depreciation .....                                    | 12,748.08        | 12,748.08        |
|   | <hr/> 132,215.81 | <hr/> 223,842.85 |
| Surplus or Deficit.....                               | 4,481.54         | 87,145.50        |

## ASSIGNMENT OF ERRORS.

(Trans. pp. 1534-40.)

The Court erred:

## I.

In dismissing said suit and entering a final decree therein in favor of said defendants and against complainants for their costs.

## II.

In not making and entering a decree in favor of said complainant and against said defendants adjudging and decreeing that the orders of the Boards of Supervisors of Stanislaus, Merced and Fresno Counties deprive, and that each of them deprive, the complainant of its property without due process of law and without just compensation, and perpetually enjoining and restraining the defendants from publishing, enforcing or attempting to enforce said orders or either of them.

## III.

In holding and deciding that complainant's income under said orders of said Boards of Supervisors is in excess of six per cent on the value of complainant's property used and useful in supplying the inhabitants of the Counties of Stanislaus, Merced and Fresno with water.

## IV.

In overruling complainant's exceptions to the report of the master made and filed therein.

## V.

In finding that the cost of reproduction of the earth-work excavation in the canals of the complainant is the sum of four hundred and twenty-nine thousand four hundred and ninety-five dollars and twenty-eight cents (\$429,495.28), for the reason that said finding is unsupported by the evidence, and the evidence shows that the cost of reproducing the same is the sum of five hundred and seventy-five thousand seven hundred and thirty dollars and ninety-five cents (\$575,730.95).

## VI.

In finding that the present value of the earthwork excavation in the said canals is the sum of four hundred and twenty-nine thousand four hundred and ninety-five dollars and twenty-eight cents (429,495.28), for the reason that said finding is unsupported by the evidence, and the evidence shows that the present value of the said earthwork excavation is the sum of seven hundred and five thousand and ninety-five dollars and ninety-five cents (\$705,095.95), and also for the reason that the Court erred in not finding that the said earthwork excavation had appreciated in value in the sum of one hundred and twenty-nine thousand three hundred and sixty-five dollars (\$129,365.00).

## VII.

In finding that the evidence is insufficient to show that the value of the said earthwork excavation has appreciated in the sum of one hundred and twenty-nine thousand three hundred and sixty-five dollars (\$129,365.00), for the reason that the said appreciation is shown by uncontradicted evidence and admitted by the witnesses of defendants.

## VIII.

In finding that the cost of reproduction of the structures on the canals of complainant is the sum of three hundred and fifteen thousand five hundred and fifteen dollars and fourteen cents (\$315,515.14), for the reason that the same is unsupported by the evidence, and the evidence shows that the cost of reproduction of said structures is the sum of four hundred and twenty thousand six hundred and eighty-six dollars and eighty-six cents (\$420,686.86).



## IX.

In finding that the amount of interest lost by complainant on its money invested during construction is the sum of Sixty-five thousand five hundred and fifty-three dollars and three cents (\$65,553.03), for the reason that the same is not supported by the evidence, and the evidence shows that the interest so lost is the sum of Eighty-three thousand and seventy-nine dollars and sixty-four cents (\$83,079.64).

## X.

In finding that complainant's properties are not enhanced in value to the extent of Forty-two thousand four hundred and seventy-one dollars (\$42,471.00), the value of the fences along the right of way of said company, for the reason that said finding is not supported by the evidence, and the evidence shows that the said properties of complainant are enhanced in value in the said sum, by reason of the existence of said fences, and by reason of the said Complainant owning said right of way freed of any liability or duty to erect fences along the same.

## XI.

In finding that complainant is not entitled to a reasonable return upon the value of the water right owned by complainant, and found to be of the value of approximately one million dollars (\$1,000,000.00), for the following reasons:

(a) Because the evidence shows that the said water right is of the value of more than seven hundred and sixty thousand dollars (\$760,000.00), to-wit: One million dollars (\$1,000,000.00).

(b) Because the evidence shows that the complainant is the owner of said water right of the value aforesaid, and is entitled to a return thereon.

(c) Because the court erred in finding that because complainant had devoted the said water right to the public use, it is not entitled to any return thereon.

## XII.

In finding that Miller & Lux never granted the said complainant any water right, for the reason that the same is not supported by the evidence, and for the reason that the evidence shows that the said water right was acquired with the expressed consent of Miller & Lux, a large riparian owner on said river; and that the same could not have been acquired without such consent, and that in consideration of the said consent, the said complainant and its predecessors granted to said Miller & Lux certain valuable rights.

## XIII.

In finding that the predecessors in interest of complainant did not pay John Bensley the sum of one hundred and twelve thousand five hundred dollars (\$112,500.00), for water rights and rights of way which he had acquired, for the reason that the evidence is insufficient to justify said finding, and the evidence shows that the said complainant did pay the said John Bensley one hundred and twelve thousand five hundred dollars (\$112,500.00) for such rights.

## XIV.

In finding that the said complainant did not pay to the said Miller & Lux a sum equivalent to one hundred and seventy-four thousand nine hundred and

twenty-nine dollars and sixty-seven cents (\$174,929.67) by way of reduced rates for water in consideration of the right of way and water right granted by that company to the predecessors in interest of complainant, for the reason that the evidence is insufficient to justify such finding, and the evidence shows that the complainant and its predecessors have paid to the said Miller & Lux a sum equivalent to one hundred and seventy-four thousand nine hundred and twenty-nine dollars and sixty-seven cents (\$174,929.67) in consideration of the rights so granted.

#### XV.

In finding that the complainant and its predecessors have not paid to the said Miller & Lux a sum equivalent to ten thousand dollars (\$10,000) a year, being the value of the waste water delivered to the said Miller & Lux under the terms of the contracts between the said Miller & Lux and the predecessors in interest of complainant, which sum if capitalized at six per cent. would amount to the sum of one hundred and sixty-six thousand six hundred and sixty-six dollars (\$166,666.00), for the reason that the evidence is insufficient to support the said finding, and the evidence shows that complainant and its predecessors have paid to the said Miller & Lux the sum aforesaid.

#### XVI.

In finding that the complainant and its predecessors in interest have not paid the sum of four hundred and fifty-three thousand and ninety-five dollars and sixty-cents (\$453,095.60) for a part of the water rights and rights of way obtained and owned by complainant for the reason that the evidence is insufficient to justify such finding, and the evidence shows that the complainant has paid the sum aforesaid.

## XVII.

In refusing to allow complainant any return upon the value of its water right for the reason that the said Court has charged complainant with all of the sums paid by it in consideration of the said water right, and has allowed said complainant nothing for the water right acquired in exchange therefor.

## XVIII.

In finding that it does not appear in the testimony what rights to water Miller & Lux owned at the time of the commencement of this enterprise, for the reason that the evidence shows that they were riparian owners upon the river, and as such riparian owners entitled to the unobstructed flow of all the waters of said river.

## XIX.

In finding that the complainant's predecessor acquired its water rights by appropriation, for the reason that the evidence shows that the said right could be acquired only by prescription, or by grant from said riparian owners.

## XXI.

In finding that the said complainant should have received and should be charged with the sum of ten thousand dollars (\$10,000.00) per annum, being the value of the waste waters delivered to Miller & Lux, for the reason that the evidence is insufficient to justify said finding, and the evidence shows that the complainant never did receive and was never entitled to receive the said sum.

## XXII.

In finding that Miller & Lux were not entitled, under the terms of its contracts with complainant, to the said waste water, for the reason that said finding is not supported by the evidence, and the evidence shows that the said Miller & Lux is entitled thereto.

## XXIII.

In finding that the purchasing of water by Miller & Lux for the irrigation of uncultivated land was inconsistent with its claim to the waters wasted by complainant, for the reason that the evidence is insufficient to justify the said finding.

## XXIV.

In finding that the said complainant could have diverted three hundred and fifty (350) cubic feet of water into its outside canal without the consent of Miller & Lux, for the reason that the evidence is insufficient to support said finding, and the evidence shows that the said complainant could not divert any water from said river without the consent of Miller & Lux.

## XXV.

In finding that Miller & Lux by purchasing said water for the irrigation of uncultivated lands, waived or abandoned any claim it had to the waste waters from said canal.

## XXVI.

In finding that more water was wasted from said canal than was necessary, and in finding that water was turned into the swamps other than water neces-

sarily wasted, for the reason that the evidence is not sufficient to support said finding, and the evidence shows that there was no more waste than necessary.

### XXVIII.

In finding that complainant will receive 7.704 per cent. income on the present value of its properties, for the reason that the said finding is not supported by the evidence, and the evidence shows that complainant will not receive even two (2) per cent. on the value of its properties.

### XXIX.

In finding that the net income which will be received by the complainant under said rates will be a just and reasonable compensation to the complainant for the furnishing of said water, for the reason that the evidence shows that the complainant will receive no just nor reasonable compensation from the said rates.

### XXX.

In finding that there is no evidence sufficient to determine the value of the franchise of complainant for the reason that the same is unsupported by the evidence, and the evidence shows that complainant's franchise is of the value of at least seven hundred and sixty thousand dollars (\$760,000.00).

### XXXI.

In finding that the total value of complainant's property is the sum of eight hundred and ninety-six thousand eight hundred and twenty-nine dollars and fifty-five cents (\$896,829.55), for the reason that the

evidence is insufficient to justify said finding, and the evidence shows that the value of complainant's property exceeds the sum of two million dollars (\$2,000,000.00).

### XXXII.

In finding that the total receipts of the said complainant under the rates fixed by said ordinances is the sum of one hundred and thirty-six thousand, six hundred and ninety-seven dollars and thirty-five cents (\$136,697.35), for the reason that the evidence is insufficient to justify said finding, and the evidence shows that the total receipts of complainant amount to the sum of one hundred and thirteen thousand three hundred and forty-seven dollars and seventy-nine cents (\$113,347.79).

### XXXIII.

In finding that the total expense of maintenance of said complaint is the sum of sixty-seven thousand one hundred and fourteen dollars and eighty-four cents (\$67,114.84), for the reason that the same is unsupported by the evidence, and the evidence shows that the said expense of maintenance of complainant is the sum of ninety-four thousand three hundred and twenty-three dollars and thirty-eight cents (\$94,323.38) per annum.

## ARGUMENT.

THE APPELLEES CONTEND AND THE TRIAL COURT HELD THAT APPELLANT IS ENTITLED TO NO RETURN ON ITS WATER RIGHTS IRRESPECTIVE OF HOW THEY WERE ACQUIRED OR WHAT THEIR ACQUISITION MAY HAVE COST THE COMPANY.

On this subject counsel for appellees in his brief in the court below stated the position of the appellees in the following manner:

"But irrespective of whether or not complainant paid any sort of consideration for its water, or water rights, and irrespective as to how or in what manner the same may have been acquired, they are within the meaning and intent of section 1, article XIV of the Constitution of California and of the irrigation act of 1885 (Stats. 1885, p. 95) appropriated to public use if (as is admitted in the case at bar) they are devoted to distribution and sale to the public, and being so devoted, or appropriated, to a public use, neither the water nor the right to its use (which constitutes the so-called water right) can, in a proceeding to fix the water rate to be paid by the public under said provisions of the state constitution and irrigation act, be valued, or included in the valuation of complainant's plant used and useful in the diversion and distribution of such waters to the public.

"Section 1 of Article XIV of the Constitution of the State of California provides:

"The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law."



"The State Irrigation Act of 1885 contains the same provisions.\*"

"Consequently, even should it appear that complainant, or any of its predecessors, had purchased any of the waters or water rights, yet such waters and water rights would, under said decisions, be nevertheless 'appropriated to public use' within the meaning of the State Constitution and Irrigation Act of 1885."

The learned judge of the court below adopted the same view and in his opinion used the following language:

"It is contended, however, on the part of complainant, that whether it paid anything for the right of appropriation or not, the fact is not conclusive of its value at the time of use, and I am of the opinion that it is not material to the controlling question whether the water right is property which the complainant as a carrier is entitled to have valued as its property under the statute. The latter question is the one to be considered in this case. The master found that the water right claimed by complainant was a valuable one, and under the testimony was of the approximate value of one million dollars."

It will be seen from this that if the water which is now being served to the public was originally in private ownership and was purchased and paid for by appellant and then devoted to the public use, the position of appellees and the trial court is that no return of any kind could be demanded on the money thus expended. Or if the company received the water from another company under a contract by which it paid a fixed sum annually for the water delivered, the result would be the same and it could get no return on the money so expended. Or if the company should acquire the

water by condemnation and should pay the value as fixed by a jury no return could be demanded on the money thus expended. In fact the company now has pending a suit to condemn additional water as against a riparian owner. (See *San Joaquin and Kings River Canal and Irrigation Company vs. Sterinson*, 164 Cal. 221.) Under this theory any amount paid by the company to acquire such rights will be lost and no return can ever be earned upon it. While this position is indeed startling, appellees were necessarily driven to it by reason of the uniform rule adopted by this court that it is immaterial how or by what means a company acquired its property, it is entitled to a return on its actual present value. The means of acquisition are necessarily immaterial. Appellees must therefore maintain the extreme position that we have indicated or abandon the claim that we are not entitled to any return on our water rights.

**APPELLEES' POSITION IS BASED ENTIRELY UPON AN ERRONEOUS CONSTRUCTION OF THE PROVISIONS OF THE CONSTITUTION OF CALIFORNIA OF 1879, EVEN IF APPLICABLE IN VIEW OF THE FACT THAT THE COMPANY'S WATER RIGHTS WERE ACQUIRED AND PARTIALLY PAID FOR AT LEAST AS EARLY AS 1871.**

The provisions of the Constitution relied upon are as follows:

**"ARTICLE XIV.**

"Section 1. The use of all water *now* appropriated (i. e. devoted), or that may hereafter be appropriated (i. e. devoted), for sale, rental, or distribution, is hereby declared to be a public use and subject to the regulation and control of the state, in the manner provided by law.

"Section 2. The right to collect rates or compensation for the use of water supplied to any county, city and country or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

The contention of appellees is simply that this constitutional provision in some way "appropriated" the water of the company to a public use *and at the same time deprived the company of any return on the value thereof.*

There are several things in connection with these enactments that should be briefly noted:

(a) The word "appropriated" does not refer to statutory appropriation of water, but it means devoted or appropriated to a public use. It refers not to the means by which the water is acquired, but to the fact that the owner has devoted or appropriated it to the use in question. The section therefore includes not only water acquired by "appropriation," but to water acquired by any means and then devoted or appropriated to the public use.

(b) The provision applies not only to water so appropriated or devoted after the adoption of the Constitution, but to water so devoted or appropriated before that time, and in the case at bar the water was acquired and the public use inaugurated several years before that time. It is difficult to see how a property right which was already vested could be destroyed by such an enactment even if it be given the meaning and effect attributed to it by appellees.

(c) The right to *sell or rent* this water was recognized subject only to the right of the state to regulate the rates or compensation "for the use of water supplied." This recognized the ownership of the water impressed with the public use.

(d) The effect of the constitutional provision is therefore not different from a like declaration that the operation of a grain elevator is a public use and subject to regulation and control. No one would construe such a provision as appropriating the elevator to a public use *without compensation*, nor, if so construed, would anyone seriously uphold its validity under the constitutional provision that private property shall not be taken for public use without compensation.

THE CONTENTION OF COUNSEL FOR APPELLEES AND THE DECISION OF THE TRIAL COURT ARE BASED ON CERTAIN DECISIONS OF JUDGE ROSS, CIRCUIT JUDGE OF THE SOUTHERN DISTRICT OF CALIFORNIA, AS TO THE MEANING OF THESE CONSTITUTIONAL PROVISIONS, WHICH HAVE BEEN DISAPPROVED BY THE SUPREME COURT OF CALIFORNIA, AND (PREVIOUS TO THE DECISION IN THE CASE AT BAR) BY THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE NINTH CIRCUIT, AND IN FACT BY JUDGE MORROW, AS A JUDGE OF THE LATTER COURT, AND BY THE RAILROAD COMMISSION OF CALIFORNIA.

Our contentions as to the meaning and effect of these constitutional provisions have been uniformly upheld by the Supreme Court of California against the contrary views of Judge Ross as Circuit Judge. Finally the Circuit Court of Appeals adopted the view of the Supreme Court and reversed Judge Ross. Judge Ross bowed to this decision while acting as Circuit Judge, but later as Judge of the Circuit Court of Appeals, again re-asserted his earlier views. The result is now an open conflict between the two courts which can only be settled by a decision of this court. The cases in the State and Federal Courts on the subject are as follows:

## STATE COURT.

- People vs. Stephens*, 62 Cal., 209, 233 (1882);  
*McCrory vs. Beaudry*, 67 Cal., 120 (1885);  
*Fresno, etc. Irrigation Company vs. Rowell*, 80 Cal., 114 (1889);  
*Fresno, etc. Irrigation Company vs. Dunbar*, 80 Cal., 530 (1889);  
*San Diego Flume Company vs. Chase*, 87 Cal., 56 (1891);  
*Clyne vs. Water Company*, 100 Cal., 310 (1891);  
*Balfour vs. Fresno etc. Irrigation Company*, 109 Cal., 221 (1895);  
*People vs. Elk River M. & L. Company*, 107 Cal., 221 (1895);  
*Merrill vs. Irrigation Company*, 112 Cal., 426 (1896);  
*Fairbanks vs. Rollins*, 54 Pac., 79 (1898);  
*San Diego Water Company vs. San Diego*, 118 Cal., 556, 567 (1897);  
*Fresno Canal Company vs. Park*, 129 Cal., 437 (1900);  
*Fellows vs. Los Angeles*, 151 Cal., 52, 58, 59 (1907);  
*Stanislaus Water Company vs. Bachman*, 152 Cal., 716 (1908);  
*Leavitt vs. Lassen Irrigation Company*, 157 Cal., 82 (1909);  
*Lassen Irrigation Company vs. Long*, 157 Cal., 94 (1909);  
*Thayer vs. California Development Company*, 164 Cal., 117 (1913).

## MONTANA.

- Willerding vs. Green*, 4 Idaho, 773, 45 Pac., 134.

## FEDERAL COURTS.

- San Diego, etc. Company vs. National City*, 74 Fed., 79 (May, 1896), (By Ross, Circuit Judge), 174 U. S. 739, 43 L. Ed. 1154 (1898);
- Lanning vs. Osborne*, 76 Fed., 319 (Sept., 1896); (By Ross, Circuit Judge);
- Osborne vs. San Diego T. & T. Company*, 178 U. S. 22, 20 Sup. Ct. 860, 44 L. Ed. 961, (Same case in Supreme Court, opinion by Mr. Justice McKenna);
- San Diego Flume Company vs. Souther*, 90 Fed., 164 (C. C. A.); 104 Fed., 707 (C. C. A.); (By Gilbert, Circuit Judge; Morrow, Circuit Judge, and Hawley, District Judge, adopting view of Supreme Court of California);
- Souther vs. San Diego Flume Company*, 112 Fed., 228 (1901); (By Ross, Circuit Judge, following Circuit Court of Appeals);
- Boise City I. & L. Company vs. Clark*, 131 Fed., 414, (C. C. A.); (Opinion by Ross, Circuit Judge, re-asserting his original views);
- Imperial Water Company vs. Holabird*, 197 Fed., 4 (May, 1912), (Opinion by Morrow, Circuit Judge, and Ross, Circuit Judge, re-asserting early views of Judge Ross; Gilbert, Circuit Judge, dissenting.)

## REVIEW OF CASES.

We shall briefly review all of these cases:

1. The Constitutional provision was first referred to in *People vs. Stephens*, 62 Cal., 209, 233, as follows:

"Now, these provisions, as well as other provisions of the Constitution, must receive a practical common-sense construction. They must be

considered with reference to the prior state of the law, with reference to the mischief intended to be remedied by the change. \*\*\*\*\* It is not left to the legislature, as formerly to say whether it shall be a public use or not, but the Constitution itself declares it to be such, and then makes the use subject to the regulations and control of the state."

2. *McCrary vs. Beaudry*, 67 Cal., 120, was a mandamus proceeding to compel defendant to furnish plaintiff with water upon payment of the rates established by the defendant and the court said:

"Whenever water is appropriated for distribution and sale, the public has a right to use it. That is, each member of the community, by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it, in a reasonable manner. Water appropriated for distribution and sold is *ipso facto* devoted to a public use, which is inconsistent with the right of the person so appropriating it to exercise the same control over it that he might have exercised if he had never so appropriated it."

3. These cases were followed by five cases, viz:

*Fresno etc. Irrigation Co. vs. Rowell*, 80 Cal., 114;

*Fresno etc. Irrigation Co. vs. Dunbar*, 80 Cal., 530;

*San Diego Flume Co. vs. Chase*, 87 Cal., 561;

*Clyne vs. Water Co.*, 100 Cal., 310;

*Balfour vs. Fresno etc. Irrigation Co.*, 109 Cal., 221,

in all of which contracts by water companies selling "water rights" for a lump sum and annual payments were upheld as valid and binding. In some of those cases the water rights were sold for a cash amount

and an annual charge. In one case the water right was exchanged for a right of way, and in one case the right was sold in exchange for a riparian right. The practical effect of these decisions was that a water company had a right to contract with an individual as to the amount he should pay in order to entitle him to receive water in the absence of any rate being fixed by the public authorities.

4. It was at this point that Judge Ross decided the case of

*San Diego, etc. Co. vs. National City*, 74 Fed. 79.

That was a suit brought to have an ordinance fixing water rates held invalid,

"and that it be decreed that the complainant corporation is entitled to charge and collect for 'water rights,' at reasonable rates, as a condition upon which it will furnish water to the inhabitants of the municipality for the purposes of irrigation, *independent of the rates fixed by the board of trustees* for water sold and furnished by the company."

In regard to this claim the court said:

"One of the objects of the present suit is to obtain a decree establishing the validity of the claim of the complainant to exact a sum of money, in addition to an annual charge, as a condition on which alone the complainant will furnish consumers of water for irrigation purposes, other than those to whom it had furnished it for such purposes prior to December 18, 1892. And the contest that arose between the consumers and the company over this charge for a so-called 'water right,' and the refusal of the municipal authorities of National City to allow that charge in respect to acreage property within the city limits, is one of the principal causes of the present suit. It



does not change the essence of the thing for which the complainant demands a sum of money to call it a 'water right,' to say, as it does, that the charge is imposed for the purpose of reimbursing complainant in part for the outlay to which it has been subjected. It is demanding a sum of money for doing what the constitution and laws of California authorized it to appropriate water within its limits, conferred upon it the great power of eminent domain, and the franchise to distribute and sell the water so appropriated, not only to those needing it for purposes of irrigation, but also to the cities and towns, and their inhabitants, within its flow, for which it was given the right to charge rates to be established by law, and nothing else. No authority can anywhere be found for any charge for the so-called 'water right.' The state permitted the water in question to be appropriated for distribution and sale for purposes of irrigation, and for domestic and other beneficial uses; conferring upon the appropriator the great powers mentioned, *and compensating it for its outlay by the fixed annual rates.* The complainant was not obliged to avail itself of the offer of the state, but, choosing, as it did, to accept the benefits conferred by the constitution and laws of California, it accepted them charged with the corresponding burden. Appropriating, as it did, the water in question for distribution and sale, it thereupon became, according to the express declaration of the constitution, charged with a public use."

It should be noted that in that case the company did not claim that it owned certain water rights upon which the rates fixed by law should give it an adequate return, but it contended that it should be permitted not only to collect the rates fixed but also an additional sum for the use of the water. In this the company

was clearly wrong, for the rates fixed by law should have been adequate to compensate the company for all of its property including its water rights. We therefore in no way question the correctness of the decision, but some of its language has been interpreted as meaning that no returns should be allowed on the water rights acquired by the company. The meat of the decision is that the company having appropriated or devoted the water for distribution and sale it became charged with a public use.

"The state permitted the water in question to be appropriated (that is, devoted) for distribution and sale for purposes of irrigation, and for domestic and other beneficial uses; *conferring upon the appropriator the great powers mentioned (eminent domain) and compensating it for its outlay by the fixed annual rates.*"

This can only mean that the state gave the company the power of eminent domain by which it could acquire the water, and that it should be compensated for its outlays in acquiring the water by fixed annual rates. Still in the case at bar it is construed to mean that although the company exercises the right of eminent domain and acquires the water and pays therefor, the rates should be so fixed as to give the company no return thereon or on its outlay therefor.

5. *San Diego, etc. Co. vs. National City*, 174 U. S., 739, 43 L. Ed. 1154.

The case last above referred to reached this court by appeal. In the statement of the case, Mr. Justice Harlan stated the contention of the company as follows:

"The plaintiff asked that it be further decreed that it was entitled to charge and collect for water rights at reasonable rates as a condition upon

which it would furnish water for the purposes of irrigation, notwithstanding the rates fixed by the trustees for water sold and furnished."

In disposing of this contention this court said:

"One of the questions pressed upon our consideration is whether the ordinance of the city should have expressly allowed the appellant charge for what is called a 'water right.' That right, as defined by appellant's counsel, is one 'to the continued and perpetual use of the water upon the land to which it has been once supplied upon payment of rates therefor established by the company.' In the opinion of the circuit court it is said that 'no authority can anywhere be found for any charge for the so-called water right.' This view is controverted by appellant, and cases are cited which, it is contended, show that the broad declaration of the circuit court cannot be sustained. *Fresno Canal & Irrigation Co. vs. Rowell*, 80 Cal. 114; *Fresno Canal & Irrigation Co., vs. Dunbar*, 80 Cal. 530; *San Diego Flume Co. vs. Chase*, 87 Cal. 561; *Clyne vs. Benicia Water Co.*, 100 Cal. 310; *San Diego Flume Co. vs. Souther* (C. C. A.), 90 Fed. Rep. 164.

"We are of opinion that it is not necessary to the determination of the present case that this question should be decided. We are dealing here with an ordinance fixing rates or compensation to be collected within a given year for the use of water supplied to a city and its inhabitants or to any corporation, company, or person doing business or using water within the limits of that city. In our judgment, the defendant correctly says in its answer that the laws of the state have not conferred upon it or its board of trustees the power to prescribe by ordinance or otherwise that the purchase and payment for so-called 'water rights' should be a condition to the

exercise of the right of consumers to use any water appropriated for irrigation or affected with a public use.

"The only issue properly to be determined by a final decree in this cause is whether the ordinance in question fixing rates for water supplied for use within the city is to be stricken down as confiscatory by its necessary operation, and therefore in violation of the Constitution of the United States. If the ordinance, considered in itself, and as applicable to water used within the city, is not open to any such objection, that disposes of the case, so far as any rights of the appellant may be affected by the action of the defendant. The appellant asks, among other things, that it be decreed to be entitled to charge and collect for 'water rights' at reasonable rates *as a condition* upon which it will furnish water for the purposes of irrigation, *notwithstanding the rates fixed by the defendant's board of trustees for water sold and furnished within the city.* That is a question wholly apart from the inquiry as to the validity under the Constitution of the United States of the ordinance of the defendant fixing annual rates in performance of the duty enjoined upon it by the constitution and laws of the state. Counsel for appellant, while insisting that the circuit court erred in saying that there was no such thing as a 'water right' says: 'The constitution of the state has nothing whatever to do with a water right or the price that shall be paid for it. It simply provides for fixing the *annual rental* to be paid for the water furnished and used. When one obtains his water right by purchase or otherwise, he has a right of demand that the water shall be furnished to his lands at the price, fixed, as provided by law, and that the company shall exact no more. But he must first acquire the right to have the water on such terms.

Whether in fixing the annual rates to be charged, the body authorized to fix them can take into account the amount that has been received by the company for water rights, is another question, *and one that is not presented in this case.* Nor is any question raised as to what would be a reasonable amount to exact for a water right, or whether the courts can interfere to determine what is a reasonable amount to charge therefor.'

"These reasons are sufficient to sustain the conclusion already announced, namely, that the present case does not require or admit of a decree declaring that the appellant may, in addition to the rates established by the ordinance, charge for what is called a 'water right' as defined by it. It will be time enough to decide such a point when a case actually arises between the appellant and some person or corporation involving the question whether the former may require, as a condition of its furnishing water within the limits of the city on the terms prescribed by the defendant's ordinance, that it be also paid for what is called a 'water right.' "

It seems perfectly clear to us that these cases can in no way be deemed authority for the proposition that in fixing rates no return should be allowed on the water rights acquired and owned by the company. On the contrary it is clear that the company took the position in those cases that the authorities in fixing the rates had nothing to do with the right of the company to make a charge for a water right. In those cases the company conceived that it had a right to furnish water only to those to whom it should sell a "water right" and that it might establish the price at which it would sell this "water right," irrespective of the action of the public authorities. To us it seems clear that in this the company was entirely in error.

Its duty was to supply the public and the right to receive that supply was vested in the public as much as is the right to transportation on a railroad. This necessarily results from the fact that the company was engaged in a business "impressed with a public use." Since the public was entitled to participate in the use, the only condition which could be imposed was the payment of the rate established by the company or by the public authorities. Our contention being that the rate so established should be sufficient to allow a proper return upon the water rights owned by the company cannot be said to have been denied in these cases in which no such claim was made or passed upon. We are speaking of water rights owned by the company; in that case they were speaking of "water rights" to be granted by the company. They were contending for the right to impose a charge beyond the established rate for the "water right" so granted. We are contending for a rate which will allow us a proper return upon the water which we own and which we have devoted to the public use. Under such circumstances it is idle to say that that case can be said to be authority against our contention. To illustrate: suppose the legislature should declare that the sale of bread was a public use and should fix a rate at which it might be sold. Could it reasonably be contended that such rate should not take into consideration the value of the commodity sold, but should only cover the cost of delivering the commodity? If some person claimed that he might, in addition to the established rate, demand a sum for the right to receive the bread and this contention was denied, could that reasonably be construed as a decision that the purveyor should receive no return on the value of the commodity? This would seem clear, but what difference is there between the commodity in that case

and the case at bar? Water is quite as valuable as bread and often relatively less plentiful. Its acquisition may cost as much and its value when acquired may be as great. What reason can there be given for allowing a return thereon in one case, and denying it in another?

As will appear from some of the authorities hereafter cited, it would be strange indeed if the state had conferred the power of eminent domain on companies such as this, authorizing them to acquire, at the expense of such companies, riparian rights such as have been acquired and are now held by this company, or other rights to water, necessary to enable the company to supply the water, and rent and distribute it to the public; it would be strange indeed if this power had been conferred, and the companies acting thereon at the same time were denied the right to any earnings or return on the money thus invested. Looked at as applied to present conditions, such a construction would enable the company to acquire such essential rights for public use upon just compensation paid by the companies to the private owners, and then would require such companies to furnish the same to the public for no compensation at all. Considered as applied to the future, the obvious effect of such a construction would be, in effect, to repeal the provisions authorizing eminent domain in such cases. Obviously, no one could be found foolish enough to make such expenditures, beneficial and needful on behalf of the public service, upon the condition that compensation or earnings thereon should not be allowed. It is altogether one thing to hold in effect that a shipper on a railroad cannot be compelled, before enjoying the service, to purchase and pay for an interest in the road, and quite another matter to deny the company, in fixing rates, earnings on the

investment necessarily expended in acquiring its rights of way and other essential rights and easements for the public service. The acquisition of its rights is undeniably essential and indispensable to the public service. They cannot be acquired without expenditures, and they have a public value. It is altogether consistent to hold that the companies may not compel a return *of* its investment before granting the right to the public service. This would be inequitable and inconsistent with the nature and character of this, and in fact, with all other public service; but to hold that a public service company may not receive a return *on* its investment or property is simply confiscatory and prohibitory. That the company may not charge a sum equal to the value of the water acquired and devoted to the public use as a condition of enjoying the public service, is doubtless a correct rule; but to hold that it has conferred upon it the powers of eminent domain, and with the corresponding duty to exercise it on behalf of the public, and that it is not to be allowed to earn on the value of the investment thus necessarily made, is to reach a conclusion upon one branch of the constitution and laws of California that is not only confiscatory and a denial of the property rights of the company, but has the unavoidable result that it repeals, in effect, other and essential provisions of the constitution and laws of that state. It has been provided that such rights may be acquired in aid of the public service, and that such companies are authorized to acquire riparian rights in aid thereof, and upon the condition that after having acquired the same they cannot withhold the use thereof from the public.

As we understand it, it is the well-established rule of decision in this court (except in certain cases not here applicable, and where independent construction



by this court is necessary) to adopt the construction of the highest courts of the several states as to the constitution and laws of such states. And, measured by this rule, we think the construction for which we here contend, is already well established. The true basis and measure of valuation in such cases seems to be illustrated by the situation that the state itself may acquire for the public use these water rights, or may, as it has done, authorize its agencies and public service corporations to acquire the same rights. If the state should acquire these rights, it would necessarily have to expend certain reasonable amounts in their acquisition and in converting them from private to public ownership. Whatever this would cost either the state or its public service agencies would be an investment, and where made on the part of a public service corporation, the same earnings thereon should be allowed as in the case of other necessary investments for the same service.

6. *People vs. Elk River M. & L. Co.*, 107 Cal. 221.

But if these cases did raise any doubt as to this proposition it was quickly removed by a decision of the Supreme Court of California in the above case, in which it was said:

"It is contended that the law of the case is changed by Section 1, Article XIV, of the State Constitution, which makes the use of water for sale, rental, or distribution, a public use. *Certainly it was not intended by that provision to appropriate such water for the use of the public without compensation.* The section recognizes the use as one in behalf of which the right of eminent domain may be invoked, and asserts the right of the state to regulate and control the sale, rental, and distribution of the same. (*People vs. Stephens*, 62 Cal., 209; *McCrory vs. Beaudry*, 67 Cal., 120.)"

That case alone and, one sentence in it is decisive of the construction of this constitutional provision. The court says:

"True the water has by the force of the constitution been appropriated to the use of the public," but "it was not intended by that provision to appropriate *such water* for the use of the public *without compensation.*"

If the water had been taken the value thereof would have been paid; if the use of the water only is taken the value of the use must be paid. It is paid only by the rates which the company may collect for the use of the water, and unless those rates do allow the company a return on the value of the water the same is taken without compensation.

7. *San Diego Water Company vs. San Diego*, 118 Cal., 556, 567.

But we need not speculate how this "just compensation" for the "water" taken is to be made, for that also has been decided by the Supreme Court of California in the case last above cited. That was a case involving the validity of water rates and the court used this language:

"It is apparent that the water company does not own the water which it collects and supplies, or the plant which it uses to collect and distribute that water, in the same sense in which a man is said to own his house or his farm. By the very nature of the use to which it is applied, the company has devoted that property to a public use. Having once undertaken to perform that must carry on its business under the lawful public duty it must continue to perform it and regulations of the government. *In effect the state may be said to have appropriated the water and the plant to public use. For that appropriation*

*it is bound to make just compensation, and it has provided for such compensation by requiring the municipal authorities to fix just and reasonable rates at which the water is to be furnished to and received by the consumers. Since the state has 'taken' the use of this property it is bound to provide a just compensation for that use, and Article XIV of the constitution must be construed as providing for that just compensation.*

"The question of what is just compensation in such a case is, we think, in all respects analogous to the question which arises in every case of appropriation under the power of eminent domain; and it may be reduced to the formula that the public must pay the actual value of that which it appropriates to the public use.

No comment on this language is necessary. With these clear cut statements of the meaning and effect of the constitutional provision we will resume the review of the cases in the Federal Courts.

8. *Lanning vs. Osborne*, 76 Fed., 319.

This case was instituted by the receiver of a water company and was decided by Judge Ross. It appeared that the company had been charging \$3.50 an acre for water. The receiver deemed this an insufficient amount and desired to establish a rate of \$7.00 an acre. The suit was brought to obtain an adjudication that such rate might be established and collected. The defendants answered, not claiming that the company had contracted with the land owners to forever furnish water for \$3.50, but that by its conduct it was estopped from charging a higher rate. The court held, and we think correctly, that the power to fix the rate was in the company until fixed by the public authority; that if the rate fixed by the company was unreasonable, the parties aggrieved must first resort to the public board having power to fix the rates. The court also

held that by selling water at one rate the company would not be estopped from changing its rates.

While this was all that was involved in the case, Judge Ross, in the course of his decision held flatly that a water company could not enter into any binding contract fixing water rates. This has ever since been his view of the law, although, as we shall show, the contrary has been time and again held by the Supreme Court of the state. This unfortunate difference of opinion on this question has resulted in the decision in the case at bar. It will be interesting therefore to examine the reasoning by which Judge Ross reached his conclusion.

(a) In the first place he refers to the fact that such contracts had been upheld by the Supreme Court of California in the *Rowell* case (80 Cal., 114) and the *Dunbar* case (80 Cal., 530), but held that in those cases it did not appear that the water companies had become subject to the public use declared by the Constitution (p. 330). As to this it is sufficient to say that the Supreme Court of California has since held that those cases did present the question as to the right of a company charged with such public use to enter into such contracts, and that in those cases the company was charged with a public use (129 Cal., 437).

(b) He next refers to a decision under the Constitution of Colorado which declared all unappropriated water "to be the property of the public." As we shall show hereafter all the decisions have since pointed out that there is no such provision in the Constitution of California, (129 Cal., 445-6; 90 Fed., 170 (C. C. A.); 4 Idaho, 773.)

(c) The court also refers to a decision of the Colorado court to the effect that under the Constitution of Colorado, the water company is not the "proprietor" of the water. Suffice it to say that it is held that

under the law of California it is the proprietor of the water.

*Thayer vs. Cal. Development Co.*, 164 Cal. 117.

(d) It also clearly appears that the question of the right of such a company to contract as to rates was not in fact involved; and this is made clear by the decision of this court reviewing that decision in

9. *Osborne vs. San Diego L. & T. Co.*, 178 U. S. 22, 20 Sup. Ct. 860, 44 L. Ed. 961.

The decision in that case was by Mr. Justice McKenna, who naturally was particularly familiar with conditions in California. After referring to the contracts between the company and the consumer, he said:

"It is apparent that the contracts in all things substantial to the controversy are similar. They provide for the payment of a certain sum for land and water rights, or for water rights alone, and all for the payment of annual rates besides. And provide directly or by reference that the annual rates shall 'be fixed by the party of the first part (the company), as allowed by law,' to be paid whether the water is used or not. Water used for domestic purposes is also to be paid for 'at the rates fixed by the party of the first part and allowed by law.'

"These provisions do not leave much room for construction. For irrigation purposes and for domestic purposes the rental of water is to be paid at rates 'fixed' by the company. The only qualification is 'as allowed by law.' What this means we shall presently consider; but whatever it means, it does not sustain appellants' contention that the rate of \$3.50 per acre per annum was irrevocable, secured to them free from the power of variation by the company or by law. *It is not important to consider, therefore, whether*

*under the Constitution and laws of the state, they could contract with the company for the price of a water right. If the contract, they plead, gives to the company the power to fix the annual rate, the only inquiry which need be, is whether the power has been exercised 'as allowed by law.' What this means can be the only controversy."*

The court then proceeded to hold that in the absence of action by the public authorities the rates might be established by the company. It will thus be seen that this court did not pass upon the power of the company to enter into special contracts respecting rates. (It should be noted in this connection that the syllabus of this case in 178 U. S. 22 is erroneous in this particular, while the syllabi in 20 Sup. Ct. and 44 Law Ed. are correct (see *San Diego Flume Co. vs. Souther*, 104 Fed. 706, 708).

10. *San Diego Flume Co. vs. Souther*, 90 Fed. 164. (C. C. A.)

The decision of Judge Ross having cast a doubt upon the validity of numerous contracts fixing the terms upon which water might be received, the matter was carried to the United States Circuit Court of Appeals in the above case. In that case the views of Judge Ross were strongly impressed upon the court, then composed of Judges Gilbert, Morrow and Hawley, but after full consideration the court rejected his view of the law and adopted the view of the Supreme Court of California that such contracts were valid and binding. The following points in the decision should be particularly noted:

(a) The court held that the decision of the Supreme Court of the state as to the meaning and effect of the State Constitution was binding upon the Federal Courts, saying:

"It becomes necessary at the outset to inquire what interpretation has been given to these provisions of the laws of California by the Supreme Court of that state. If it has become the settled law of the state that such contracts may be made and enforced by water companies and the consumers of water, the federal courts are bound to adopt the construction so established. *Burgess vs. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10; *Gage vs. Pumpelly*, 115 U. S. 454, 6 Sup. Ct. 136; *Norton vs. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121. In *Claiborne Co. vs. Brooks*, 111 U. S. 400-410, 4 Sup. Ct. 494, Mr. Justice Bradley said:

"It is undoubtedly a question of local policy with each state what shall be the extent and character of the powers which its various political and municipal organizations shall possess, and the settled decisions of its highest court on this subject will be regarded as authoritative by the courts of the United States, for it is a question that relates to the internal constitution of the body politic of the state."

(b) The court then held that the decisions of the State Court in the *Rowell* case (80 Cal. 114), *Dunbar* case (80 Cal. 530), the *Chase* case (87 Cal. 561) and *Clyne* case (100 Cal. 310) did pass upon and decide the question contrary to the decision of Judge Ross.

(c) The court held that the mere fact that the water was impressed with a public use did not make it public property, saying:

"Corporations engaged in the business of furnishing water for irrigation, under the laws of California, whether they acquire the water by appropriation of the waters of the state or otherwise, are private corporations. They are nowhere declared to be public corporations or quasi public.

They conduct their business for private gain. For reasons affecting the public welfare, they are given the right of eminent domain, and, in order that the use of the water may be fairly and equitably adjusted to consumers and their rights protected under the constitution, it is provided that in a certain contingency the rate to be paid by the consumer may be fixed in a manner prescribed by law. The use is public only to the extent that the corporation may be compelled to furnish the water, provided it has the capacity to do so, to all who receive and pay for the same, and that the rule of compensation shall be fixed by the law in case the parties cannot agree."

(d) The court also referred to the Colorado cases, decided under the peculiar provisions of the Colorado constitution and held that they were not authority for the decision of Judge Ross under the constitution of California.

(e) It is only proper to call attention to the fact that Judge Morrow, who decided the case at bar, was then a member of the Circuit Court of Appeals and apparently concurred in the decision.

11. *Fresno Canal Co. vs. Park*, 129 Cal. 437.

The parties vitally interested in this matter also took it again before the State Supreme Court in the above case and after most careful consideration that court reached the conclusion that such contracts were valid, and that the constitutional provisions had no such effect as that attributed to them by Judge Ross.

In that case the predecessor in interest of defendant had entered into an agreement with the plaintiff by which the plaintiff agreed to furnish water from its canal for a certain sum of money for a certain number of years, and the predecessor in interest of defendant agreed to pay an annual sum of money therefor, and



the covenants of the agreement were declared to run with and bind the land in question. The suit was brought to recover the annual charge and to enforce payment against the land in question. The court called attention to the fact that this contract had been upheld in previous cases, but it was claimed that the contract was forbidden by the constitution of 1879, or, to use the language of the court:

"It is contended, however, that those cases should not be considered of any value as authorities, here, because in all of the said cases the court had entirely overlooked or forgotten prominent provisions of the constitution now called to our attention and the learned counsel of the parties opposed to the present respondent in those cases failed, through dimness of mental vision, to see and call attention to the conspicuous wall of the constitution behind which, according to appellant's contention, they could have safely put their client. It would be remarkable indeed if, during the consideration of all of these various cases, and down to 1898, the thought never suggested itself to either court or counsel that the novel and notable provisions of the constitution about water now relied upon could be invoked as defenses to those actions; but, as such thing is barely possible, we will give the question an independent investigation."

After referring to section 1 of article XIV of the constitution, the court said:

"Now, there is nothing in the said first clause of section 1 above quoted which in itself at all affects the validity of the contract in question in the case at bar. The clause merely declares that the use of water appropriated for distribution, etc., is a public use, and that the state may by law regulate it."

Referring then to section 2, the court said:

"Whatever right a ditch owner had to sell and distribute water at the time the constitution was adopted or afterward was not destroyed because it was called in the constitution a franchise."

Referring to the second clause of section 2, the court said:

"This contention rests on the proposition that when the constitution was adopted in 1879 it immediately prohibited the owner of a water ditch from selling any water or making any contract about furnishing water or collecting any rentals therefor until the legislature should enact the statute expressly conferring power to do these things, and further that the constitution gave the legislature power by inaction to destroy all property in ditches and water rights used for the distribution and sale of water. This proposition cannot be maintained."

The opinion is too long for quotation, but there is no question but that that case gives a final interpretation to the constitutional provisions in question which are binding upon this court, whether they are in accordance with the views of Judge Ross or not, and that decision has been repeatedly affirmed by the Supreme Court of the state. There is another matter connected with it in particular which should be noted, namely, that even if the constitution had attempted to confiscate these water rights, and had intended to expressly provide that no return could be allowed thereon, such a constitutional provision would have been invalid under the federal constitution. On this subject the court said:

"Is it possible that the constitution intended to practically destroy or confiscate all this immense property or to allow the legislature to do it? It could not have accomplished this result within the principles of the federal constitution and it is not to be held that it intended to do so unless the language of the constitution which it constructed leaves no doubt on the subject."

The court also referred to the Colorado cases and said:

"But the latter are, we think, mainly founded upon the provision of the constitution of Colorado, *materially different from the provisions of our constitution on the subject*, which declares that the water of all natural streams not theretofore appropriated, is the property of the public."

The court also called attention to the decision of the United States Circuit Court of Appeals in the *Souther* case (in which a rehearing had been granted to await the decision of the state court) and gave the opinion in that case its approval.

The Circuit Court of Appeals subsequently rendered another opinion on rehearing, reported in

12. *San Diego Flume Co. vs. Souther*, 104 Fed. 707, in which that court reaffirmed its previous decision, and approved the decision of the state court in the *Park* case, which it also held to be binding upon the court.

13. The *Souther* case then went back to Judge Ross for further proceedings and he called attention to the fact that his views on the subject had been disapproved by the Circuit Court of Appeals and then proceeded to give effect to the decision of that court. See

*Souther vs. San Diego Flume Co.*, 112 Fed. 228.

14. This was in 1901 and the bar felt that at last this annoying proposition had been settled and that Judge Ross had acquiesced in the conclusion reached. But in 1904 the Circuit Court of Appeals was composed of Judges Ross, Gilbert and Hawley and an opinion was rendered by Judge Ross in the case of

*Boise City I. & L. Co. vs. Clark*, 131 Fed. 414.

That case involved the validity of a rate fixed by public authority, and it appeared that the company was supplying water to certain consumers at rates less than those fixed by the ordinance which was attacked. The result was insufficient revenue, while the revenue would have been sufficient if the rates applied equally to all its consumers. The court thereupon properly held (as stated in the syllabus):

"An irrigation company appropriating water for sale has no authority to make a distinction between its consumers, and, while supplying some with water under private contracts at low rates, attack the validity of maximum rates fixed by the county commissioners under the statute on the ground that, as applied to its other consumers, they will not yield a reasonable return on its investment, but will amount to a taking of its property without compensation. In determining the reasonableness of such rates, they must be considered as applicable to all its consumers."

There can be no doubt of the correctness of this decision, but in his opinion Judge Ross used certain language which it is now claimed re-asserted his early views as Circuit Judge which had been repudiated by the Court of appeals and the Supreme Court of California. Judge Ross may have unconsciously done so, but it is difficult to believe that he intended to have Judges Gilbert and Hawley, who concurred in the

*Souther* case only four years before, overrule that case without even referring to it, and at the same time disregard the decision in the *Park* case, which they had held was legally binding upon them. All that they could have intended to decide was that no contract could affect the right of the state to establish maximum rates, and so far as it affected the right of the state in that regard it must be disregarded and to that extent was void. It is unnecessary to consider how far a contract is affected by a subsequent ordinance fixing a different rate, and certainly the decision that the contract should be disregarded in determining the validity of the ordinance was correct. But if it was intended to revert to the position that such contracts are forbidden by the constitution, that the company does not own the water, that it belongs to the public, who need make no compensation therefor, and that the company can enter into no contract respecting the same—all we need say is that the decision is contrary to the decision of the state court as to the effect of the state constitution, which decision is properly held to be binding upon the federal courts.

15. *Stanislaus Water Co. vs. Bachman*, 152 Cal. 716.

The decision last referred to at least had the effect of encouraging the parties interested to reopen the entire matter before the Supreme Court of the state, which was done in the case above named. In that case a water company entered into a contract with the land owner to supply him with water at a fixed sum for the period of twenty years. Subsequently the company established a higher rate and sought to enforce its payment. In holding that the contract was valid and binding on the company, the court said:

“The appellant suggests that under the provisions of article XIV of the constitution, adopted in 1879, the use of water appropriated for sale,

rental, or distribution is a public use, the regulation and control of which, including the right to collect compensation for such use, is vested in the state, and that, by reason of these provisions, the making of a contract whereby one citizen is given the exclusive right to a part of such water, or by which it is set apart to a particular tract of land, at a rate fixed in the agreement, would destroy the control of the state and convert the public use into private property.

*"If the water-right of the Stanislaus and San Joaquin Water Company was in private ownership and use at the time the constitution of 1879 was adopted, we do not see how it could become dedicated to public use by the adoption of the constitution, or at all, except by consent, express or implied, of its owners. The record does not show whether it was acquired before or after that date.*

*"But if it is conceded that the water-right has become subject to public use in the sense in which that term is used in the constitution, we do not think that any violation of the constitution appears. The constitutional provision was not intended to prevent a land owner from acquiring and attaching to his land a right to the permanent use of water for its irrigation. If the right to the use of water for that purpose cannot be made permanent, but is subject to change or termination at the hands of the public authorities under the guise of regulation and control, then such use would be of little value. Water for irrigation is not ordinarily used for annual crops for which the place of use can be changed from year to year, perhaps without serious injury, but for trees, vines and alfalfa, which must be given water each year for a series of years, to be successfully grown at all. To make land valuable for such use, it must have the right to a permanent and continuous use of water. The constitutional pro-*

vision was not intended to prevent this. The purpose was to foster and encourage such industries, rather than hamper and obstruct them by destructive limitations upon the right of acquiring private property. Permanent rights to the use of water for irrigation may still be obtained by contract, notwithstanding the provisions of the constitution, subject only to the condition that the state may, if it chooses to do so, regulate and control the use. This question was fully considered and decided in *Fresno C. & I. Co. vs. Park*, 129 Cal. 443 (62 Pac. 87), and we refer to that case for a full discussion of the subject. How far the state can go in the regulation and control of the use when thus secured by private contract it is not necessary here to decide. The legislature had delegated the power of control and regulation of waters outside of cities, to the boards of supervisors of the respective counties. (Stats. 1885, p. 95; Stats. 1897, p. 49; Stats. 1901, p. 80.) It does not appear that there has been any attempt to regulate or control the use of water in Stanislaus county, and, consequently, the terms of the contract remain in full force and constitute the measure of the rights of the parties. (*Fresno C. & I. Co. vs. Park*, 129 Cal. 443 (62 Pac. 87).) And under the present statute the contract rights prevail in all cases, the boards of supervisors being powerless to affect or interfere with them. (Stats. 1897, p. 49.)

16. *Leavitt vs. Lassen Irrigation Co.*, 157 Cal. 82;

*Lassen Irrigation Co. vs. Leavitt*, 157 Cal. 94.

We do not feel that these cases have any bearing on the subject under discussion, but as they have been relied upon as overruling the decision in the *Park* case (approved in the *Bachman* case), we will briefly refer to them. The decision in those cases was simply

that a water company could not give any person a private preferential right to water superior to the rights of the public. No criticism can be made of this decision. In reaching this conclusion the court said:

"The fundamental and all important proposition, then, is this, that a public service water company which is appropriating water under the constitution of 1879, for purposes of rental, distribution, and sale, cannot confer upon a consumer any preferential right to the use of any part of its water. Even before the adoption of the constitution of 1879 and its declaration therein contained (art. XIV, sec. 1) it was said by this court in *Price vs. Riverside L. & I. Co.*, 56 Cal. 431:

"Every corporation deriving its being from the act above cited, has impressed upon it a public trust, the duty of furnishing water, if water it has, to all who come within the class or community for whose alleged benefit it has been created.' In *McCrary vs. Beaudry*, 67 Cal. 120 (7 Pac. 264), is contained the first statement of this court in construction of the constitutional provision: 'Whenever water is appropriated for distribution and sale, the public has a right to use it, that is, each member of the community, by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it, in a reasonable manner.' And in the late case of *Hildreth vs. Montecito Creek Water Co.*, 139 Cal. 22 (72 Pac. 395), it was said by Mr. Justice Shaw, speaking for the court in bank, in defining the public use declared by the constitution: 'In the case of a public use, the beneficiaries do not possess rights to the waters which are, in the ordinary sense, private property. A public use "must be for the general public, or some portion of it, and not a use or for particular individuals, or for the benefit of certain estates." (*McQuillen vs. Hatton*, 42 Ohio St. 202.) "The use and benefit must be



in common, not to particular individuals or estates." (*Lewis on Eminent Domain*, sec. 161; *Coster vs. Tide Water Co.*, 18 N. J. Eq. 68; *Pocantico Co. vs. Bird*, 130 N. Y. 259 (29 N. E. 246); *Gilmer vs. Lime Point*, 18 Cal. 251; *McFadden vs. County of Los Angeles*, 74 Cal. 571 (16 Pac. 397).) The right of an individual to a public use of water is in the nature of a public right possessed by reason of his *status* as a person of the class for whose benefit the water is appropriated or dedicated. All who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not. The principle receives universal recognition, says the Supreme Court of Indiana, in *State ex rel. Wood vs. Consumers' Gas Trust Co.*, 157 Ind. 345 (61 N. E. 674, 55 L. R. A. 245): 'No statute has been deemed necessary to aid the courts in holding that, when a person or company undertakes to supply a demand which is affected by a public interest, it must supply all alike who are like situated, and not discriminate in favor of nor against any.' (45 Cent. L. J., p. 278; *Haugen vs. Albina L. & W. Co.*, 21 Or. 411 (14 L. R. A. 424, 28 Pac. 244); *Olmstead vs. Morris Aqueduct*, 47 N. J. L. 311; *Commonwealth vs. Wilkes Barre Gas Co.*, 2 Kulp (Pa.) 499; *Chicago & N. W. R. Co. vs. People*, 56 Ill. 365 (8 Am. Rep. 690); *Nebraska Telephone Co. vs. State*, 55 Neb. 627, 634 (45 L. R. A. 113, 76 N. W. 191); *Watanga Water Co. vs. Wolfe*, 99 Tenn. 429 (6 Am. St. Rep. 841, 41 S. W. 1060); *State vs. Delaware L. & W. R. Co.*, 48 N. J. L. 55 (57 Am. Rep. 453, 2 Atl. 803).

"All are equally entitled to share in the use of the water who pay, or offer to pay, the legal rate and to abide by the reasonable rules and regulations of the company. *It does not follow that a water company may not make specific contracts*

with individual consumers which are within the purview of the constitution and within valid legislative enactments regulating the public use. This is precisely as decided by *Fresno Canal Co. vs. Park*, 129 Cal. 437 (62 Pac. 87). But, as decided in *Crow vs. San Joaquin Irr. Co.*, 130 Cal. 309 (62 Pac. 562, 1058), immediately following the *Park* case, such a contract, even if violated by the consumer, could not operate to deprive him of his constitutional right to the water furnished by the public service corporation upon tender to it of the legal rate. For the breach of the consumer's contract, the water company must seek other redress than that of depriving the consumer of his share of the supply. The language of this court in *Stanislaus Water Co. vs. Bachman*, 152 Cal. 716 (93 Pac. 858), must be construed in the light of the facts there presented. The court was there considering the claim of a water company to the right to collect rates in excess of those fixed by a contract made with its predecessor, its claim being in part founded on the theory that by a foreclosure sale it had acquired the water and distributing system free from that contract. The opinion, in the main, goes upon the theory that the water in control of the company was not subject to a public use, and upon that theory it was held that the contract to furnish water to Bachman's land attached the water-right to it as an appurtenance, with the right to receive water from the previous owner of the system and its successors at the contract rates. The company made the additional argument that the water was in fact devoted to public use, that if it could be thus attached to land as an appurtenance the property dedicated to public use would be converted into private property, and that, as this could not be permitted, the contract was against public policy and void, so far as it at-

tempted to create the appurtenance or fix rates. This argument is not fully stated in the opinion. *In answer to the argument the court cited the case of Fresno, etc., Co. vs. Park, 129 Cal. 437 (62 Pac. 87), and declared that the constitutional provision regarding water devoted to public use did not prevent a water company from making a contract giving to a particular tract of land the right to receive water for permanent and continuous use for irrigation, subject to the condition that the public authorities could regulate and control the use. Such a contract disposing of water devoted to public use of course would not technically attach it to the land as an appurtenance. It would do nothing more than bring the land within the territory to which the public use extended, and establish its status as land permanently entitled to share in the public use. It did not appear in that case that any public regulation had been made and the contract controlled the rights of the parties. It was, therefore, immaterial, so far as the right to collect the rates in controversy in that case was concerned, whether the water-right was appurtenant to the land as private property or whether the land was entitled to a part of the water as a sharer in the public use, where public rates had not been fixed and private contracts controlled. This is the essence of the decision and it does not conflict with Hildreth vs. Montecito Creek Water Co., 139 Cal. 22 (72 Pac. 395), or any other cases on the subject of public use."*

We do not feel that any comment is necessary on this language, as it is clear that it in no way changes the previous decisions of the court as to the meaning of this constitutional provision.

17. *Imperial Water Co. vs. Holabird*, 197 Fed. 4.

The latest case on the subject by the federal courts is the above cited case. In that case the California Development Company, having been incorporated for the purpose of appropriating certain water of the Colorado River, formed a number of subsidiary companies whose corporate object was to furnish water to their stockholders for the irrigation of certain lands. In consideration of the agreement of the California Development Co. to furnish certain water to the subsidiary companies, they agreed that the former company should be entitled to sell the entire capital stock of the subsidiary companies. By this means the former company was enabled to fix the price at which each stockholder should receive water. The Circuit Court of Appeals, to which the validity of this contract was submitted, was composed of Judges Ross, Morrow and Gilbert. The two former held the contract invalid, while Judge Gilbert dissented, holding it valid. We do not intend to review at length the two opinions rendered in that case, but submit them to the consideration of the court so far as they are applicable to the question involved in the case at bar. Suffice it to say that within a few days after this decision was rendered the Supreme Court of California rendered a decision in a case involving the same transaction and holding that the California Development Company was not a public service corporation, that the subsidiary companies were formed to furnish water to their stockholders only, and no one else could demand water. Clearly, therefore, the corporation might sell the stock for such prices as it saw fit. The case referred to is

18. *Thayer vs. Cal. Development Company*, 164 Cal. 117.

In that case the court used some language supporting our claim as to the meaning of the constitutional provision here involved. For instance, as to the dif-

ference between the "appropriation" of water and the appropriation to public use, the court said:

"Under the law of this state as established at the beginning, the water right which a person gains by diversion from a stream for a beneficial use is a private right, a right subject to ownership and disposition by him, as in the case of other private property. All the decisions recognize it as such. Many of them refer to it in terms which can have no other meaning than that the right is private property. We need not cite them all. The following early cases sufficiently establish the proposition: *Eddy vs. Simpson*, 3 Cal. 251; *Irwin vs. Phillips*, 5 Cal. 146; *Tartar vs. Spring Creek Co.*, 5 Cal. 398; *Conger vs. Weaver*, 6 Cal. 557; *Hoffman vs. Stone*, 7 Cal. 49; *Morris vs. Bicknell*, 7 Cal. 262; *Hill vs. King*, 8 Cal. 336; *Kimball vs. Gearhart*, 12 Cal. 47; *Oatman vs. Dickson*, 13 Cal. 38; *Kidd vs. Laird*, 15 Cal. 180; *Rupley vs. Welch*, 23 Cal. 455.

"By the act of congress of July 1, 1866, the United States confirmed all water rights then vested in streams upon the public domain in California, and provided for the acquisition of similar rights therein in the future. These, of course, became private property when so acquired. (*DeNe-cochea vs. Curtis*, 80 Cal. 397; *Natoma Water, etc. Co. vs. Hancock*, 101 Cal. 42.)

"The Civil Code of 1872 recognizes and declares the same doctrine and prescribes the mode by which water rights may be gained and protected. Section 1410 declares that 'the right to the use of running water' of a stream, canyon or ravine 'may be acquired by appropriation.' The succeeding sections, to 1422 inclusive, prescribe the mode by which it may be acquired. *The language plainly imports that the right, when acquired, is the property of the person who claims it and*

takes the steps prescribed to gain it. And, generally, it is true that, even when property is dedicated or appropriated to public use for gain by persons or private corporations, the title and ownership is private and the only interest of the public is that of beneficiaries of the use or trust. The property does not become impressed with a public use or trust until after the owner has first acquired it and then dedicated it to the use. The acts of acquisition and of dedication, respectively, are distinct from each other. Technically, the latter must follow the former and cannot precede or accompany it.

"An 'appropriation of water' under the code is, therefore, not, *ipso facto*, a dedication or appropriation to public use. The additional act of dedication is as necessary to the creation of a public use in a water right so acquired as it would be if the right was acquired by conveyance or in any other manner, or as in the case of any other property dedicated to public use."

It clearly results from this that the company is the owner of the water which it appropriates, and being the owner when it devotes or appropriates that property to a public use it is entitled to a return on the value thereof.

19. *Wilterding vs. Green* (Idaho), 45 Pac. 134.

This case arose under the constitution of Idaho, which is identical with the constitution of California. The court was urged to adopt the view expressed by the Supreme court of Colorado in the case of *Wheeler vs. Irrigation Co.*, 10 Colo. 582, 17 Pac. 487, that under the constitution of Colorado the company is not the "proprietor" of the water appropriated by it. But the court refused to adopt that view of the law and said:

"The marked distinction between the provisions of the constitution of Colorado and that of Idaho

will be apparent upon a very slight inspection of the two. The Colorado constitution is prospective. It makes provision and lays down rules that 'The water of every natural stream not heretofore appropriated within the State of Colorado, is hereby declared to be the property of the public,' etc. Prior to the adoption of this constitutional provision, the right of private persons to acquire property in natural streams through appropriation had been recognized in Colorado as it had throughout the Pacific coast; but the character of this right was changed by the constitutional provisions above quoted, and thereafter the water of such streams became and was 'the property of the public.' Compare section 5 of article 16 of the constitution of Colorado with section 1 of article 15 of the Idaho constitution, which is as follows: 'The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental, or distribution, also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be, sold, rented or distributed, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law.' The distinction between the two provisions, it seems to me, is too palpable to require elucidation or warrant discussion. The Colorado constitutional provision recognizes the previous existence of private property rights in the water of natural streams, but prohibits the acquisition of such rights in the future. The Idaho constitution does not pretend or assume to control or interfere with private property rights in such waters, but declares the use of all such waters, whether theretofore or thereafter appropriated, a public use, and under the control of the state. The doctrine of the Colorado court, that the canal or ditch owner is a mere 'common carrier' could

not, certainly, be predicated upon the provisions of the Idaho constitution. That it was the purpose and intention of the Idaho constitution to deal only with the 'use' of water, and not with the property rights of appropriators therein, is, I think, further evidenced by the including within its provisions 'all water originally appropriated for private use, but which after such appropriation has heretofore been or may hereafter be sold, rented, or distributed.' *The sale, renting, and distributing of the water is a dedication, and brings its use under the control of the state, but it in no sense destroys or abrogates the property rights of the appropriator therein.*"

**THE ACT OF 1885 CONTEMPLATES THAT WATER RIGHTS ARE TO BE CONSIDERED AS PART OF THE CAPITAL OF THE COMPANY ON WHICH IT IS ENTITLED TO A RETURN.**

"Said Board of Supervisors, in fixing such rates, shall, as near as may be, so adjust them that the net annual receipts and profits thereof to the said persons, companies, associations, and corporations so furnishing such water to such inhabitants shall not be less than six or more than eighteen per cent. upon the said value of the canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water to each of such persons, companies, associations, and corporations; but in estimating such net receipts and profits, the cost of any extensions, enlargements, or other permanent improvement of such *WATER RIGHTS* or water works shall not be included as part of said expense of management, repairs and operating of such works, *but when accomplished, may and shall be included in the present cost and cash value of such work.*"

(Stats. of Cal. 1885, p. 95, Sec. 5.)



**THE STATE LEGISLATURE HAS ALSO RECOGNIZED THE  
VALIDITY OF CONTRACTS FOR THE SALE, RENTAL  
AND DISTRIBUTION OF WATER.**

In 1897 a new section was added to the act of 1885 to read as follows:

"Nothing in this act contained shall be construed to prohibit or invalidate any contract already made, or which shall hereafter be made, by or with any of the persons, companies, associations, or corporations, described in section two of this act, relating to the sale, rental, or distribution of water, or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract."

(Stats. of Cal. 1897, p. 49.)

In 1901 the legislature passed the following act on the subject:

"It is and shall be lawful for any person, company, association, or corporation, furnishing for sale, rental or distribution any appropriated waters for purpose of irrigation, to enter into contracts with individual consumers, relating to the sale, rental, or distribution of such water, or any thereof which contracts, subject to the restrictions hereinafter declared, shall be valid to all intents and purposes, any law or rule to the contrary notwithstanding.

"No such contract shall provide for the sale, rental, or distribution of any such water at any rate exceeding the established rates fixed and regulated therefor by the board of supervisors of the proper counties, or fixed and established by such person, company, association, or corporation, as provided by law.

"Nothing in this act contained shall be construed to authorize or make valid any contract not made

for a valuable consideration; but an agreement on the part of such person, company, association, or corporation to sell, rent, or distribute any water to a consumer without payment in advance therefor, or upon any other terms to which such consumer is not otherwise lawfully entitled, shall be deemed and taken to be a valuable and sufficient consideration for such contract.

"Nothing in this act contained shall affect any contract made prior to the time that the board of supervisors fix and establish the rates and regulations for and under which water shall be sold and supplied."

(Stats. of Cal. 1901, p. 331.)

**THE RAILROAD COMMISSION OF CALIFORNIA, THE  
SUPREME RATE FIXING TRIBUNAL IN THE STATE,  
HAS ADOPTED OUR VIEW OF THE MEANING AND  
EFFECT OF THESE CONSTITUTIONAL PROVISIONS.**

In 1911 the people of California amended the state constitution, making the State Railroad Commission a general Public Utilities Commission having general control of rates of all public utilities, including water companies. (Const. of Cal., Art. XII, Sec. 23, Stats. 1911, p. 2048.) For the purpose of enforcing this amendment an elaborate Public Utilities Act was passed (Stats. of Cal. 1911, Extra Session, p. 18).

Its opinion on any question involving the correct basis of rates and the true relation of the public utility to the public is deserving of great weight. With full knowledge that the view that the waters appropriated by the company are "public property," and the view that the company is not the "proprietor" thereof, and the view that the water appropriated is vested in the land owners, and the view that the provision of the constitution of Colorado is the same as that

of California—well knowing that such views would deprive the company of any return on its “water rights,” while the contrary view would entitle it to such return, that commission adopted our view on all of these matters.

*Tyndale Palmer vs. Southern Cal. Mountain Water Co.*, Decision No. 418, decided January 21, 1913.

We quote the following from that decision:

“Much of the confusion which is found in the irrigation law of this state is due, in my opinion, to a failure on the part of those interpreting the law to understand certain fundamental distinctions between water devoted to private purposes and water devoted to public uses. Article XIV, sections 1 and 2, of the constitution deal not with the appropriation of water, but with the power of the state to regulate agencies impressed with a public use. Those sections of the constitution deal entirely and solely with water, or more properly the use of water appropriated at the time the constitution was adopted or thereafter appropriated ‘for sale, rental or distribution,’ and it has been held and is the settled doctrine of this state, that the power of the state to regulate such companies is entirely independent of the method of acquisition by them of water. *Merrill vs. Southside Irrigation Company*, 112 Cal. 427. It matters not whether the person or corporation selling water to the public appropriates it (and here I use ‘appropriates’ in an entirely different sense from that in which it is used in the case just cited) from the public waters of the state, or the United States; bores wells on private lands and pumps the water into ditches; purchases all the riparian rights in a stream and diverts the water by reason of riparian ownership of lands

and the lack of any one who has the legal right to complain; or takes it from the sewers of a city. In every case the constitutional provision applies and the devotion of the water to the public purposes of sale, rental or distribution impresses the agency with the character which subjects it to regulation by the state. Sections 1410 to 1422, inclusive, of the Civil Code deal with another aspect of the water question, namely, the method of acquiring rights to unappropriated water. The agency desiring to take water, the right to the use of which has not yet been acquired by other agencies, has prescribed for it in these sections one method of acquiring the right, and this method is the same whether the agency desires to divert the water and put it upon private lands owned by itself or devote it to the public uses of sale, rental or distribution to the public or some part thereof. *It has always been difficult for me to understand how such almost hopeless confusion could have been the result of these plain provisions of the constitution and the statutes, provisions so utterly unrelated; but we find law writers and courts saying that the waters of the state belong to the public (as they do by the constitutional provisions in some other western states) by reason of the two sections of article XIV of the constitution, which do not remotely bear upon the subject and only make the agency which has by any means lawfully acquired the right to be in control of a quantity of water subject to regulation when such agency sells, rents or distributes such water to the public or a portion thereof.*

\* \* \* \* \*

"Article XIV of the constitution merely makes certain agencies subject to regulation. The manner of regulation is that which shall be prescribed

by law. The legislature thereafter passed certain statutes prescribing the method and extent of regulation. (Stat. 1885, p. 95, Public Utilities Act, Stat. 1911, p. 18, Extra Session.) Except as restricted by the constitution the legislature may prescribe whatever regulation it sees fit, *but legislation pursuant to said constitutional provision could not properly deal with the method of acquisition of the water by the agencies therein made subject to regulation, the public use and the power to regulate attaching as a result of the devotion of the water to purposes of sale, rental and distribution, and having no reference whatsoever to anything else.* The sections of the Civil Code on the other hand (1410 to 1422) dealing, as they do, entirely with methods of *acquisition* of water and not its *distribution*, are founded on entirely different fundamental powers of the state and have no more effect upon the agencies dealt with in article XIV of the constitution than they do upon railroads or gas corporations, except as they may or may not be involved in the acquisition of a supply of water which may or may not be used in a way which subjects the possessor to regulation prescribed in the article of the constitution. In short, the law dealing with acquiring rights to water by individuals or corporations is not concerned in the least with what such persons or corporations do with such water, *while the law dealing with the public distribution of water and the agencies engaged therein is equally disinterested in and oblivious to the subject of acquisition of water."*

AS A MATTER OF LAW THE COMPLAINANT IS ENTITLED  
TO A REASONABLE RETURN UPON THE VALUE OF  
ITS WATER RIGHT.

The right of the complainant to have a return upon the value of its water right can be justified from four separate and distinct standpoints: First, by considering the water right as a distinct and separate right of property owned by the complainant; second, by considering the water right as increasing the value of the company's franchise, which is a separate and distinct species of property owned by the company upon which it is entitled to a return; third, by considering the water right as adding to and increasing the value of the tangible property and works of the company over and above the mere replacement cost of the same—the water obtained by virtue of the rights acquired and owned being tangible property; fourth, by considering the water as adding to the value of the company's property as a "going concern." We will briefly consider each of these points of view.

I.

*A water right whether acquired by appropriation, purchase, prescription or condemnation is property, and the Canal Company appropriating it is the proprietor thereof.*

*Black's Pomeroy, Water Rights, Sections 58-61;*  
*People vs. Elk River M. & L. Co., 107 Cal. 221;*  
*In re Delinquent Taxes, 81 Minn. 422, 84 N. W. 302;*

*Strickler vs. Colorado Springs, 26 Pac. 313;*  
*Gould on Water Rights, Sec. 324;*  
*Bigelow vs. Draper, 6 N. Dak. 152, 69 N. W. 570;*

- Buffalo vs. Delaware, etc. Co.*, 39 N. Y. Supp. 4;  
*Hallock vs. Suitor*, 37 Oregon 9, 60 Pac. 384;  
*Wyatt vs. Larimer & Weld I. Co.*, 1 Colo. App.  
 480, 29 Pac. 906;  
*Rigney vs. Tacoma, etc. Co.*, 9 Wash. 570, 38  
 Pac. 147;  
*New Whatcom vs. Fairhaven L. Co.*, 24 Wash.  
 493;  
*Lux vs. Haggin*, 69 Cal. 255, 300;  
*St. Helena Water Co. vs. Forbes*, 62 Cal. 182;  
*Gould vs. Stafford*, 91 Cal. 146, 155;  
*Winnipiseogee Lake, etc. Co. vs. Gilford*, 64 N.  
 H. 337, 10 Atl. 849;  
*Amoskeag Mfg. Co. vs. Concord*, 66 N. H. 562,  
 24 Atl. 241;  
*Yates vs. Milwaukee*, 10 Wall. (U. S.) 497, 19  
 L. Ed. 984;  
*Paine L. Co. vs. United States*, 55 Fed. 854, 867;  
*Sillman Timber Co. vs. Mobile*, 110 Fed. 186,  
 192;  
*Union, etc. Co. vs. Brunswick*, 31 Minn. 297;  
*Bradshaw vs. Duluth, etc. Co.*, 52 Minn. 59, 53  
 N. W. 1066, 1068;  
*Meyers vs. St. Louis*, 8 Mo. App. 266;  
*Emporia vs. Soden*, 25 Kan. 588.

The Canal Company may purchase water rights.

- Water Supply & Storage Co. vs. Tenney*, 24  
 Colo. 344-351;  
*Mud Creek, etc. Co. vs. Virian*, 74 Tex. 170, 11  
 S. W. 1078;  
*North, etc. Co. vs. Utah, etc. Co.*, 16 Utah 346,  
 52 Pac. 168.

The Canal Company in appropriating water is the principal and not the agent, and owns the appropriation.

- Montecito Water Co. vs. Santa Barbara*, 144 Cal. 578, 592-3;  
*Nevada Ditch Co. vs. Bennett*, 30 Or. 59, 45 Pac. 472;  
*Albuquerque L. & I. Co. vs. Gutierrez*, 10 N. M. 177, 61 Pac. 357;  
*Thayer vs. Cal. Dev. Co.*, 164 Cal. 117;  
*Palmer vs. Southern Cal. Mountain Water Co.*, R. R. Com. of Cal. Decision No. 418.

Even if the company should be considered an agent of the consumer in making the diversion, still it is not a gratuitous agent and is entitled to be compensated for the value of the property right acquired by it, and used by the consumer. This would obviously be true if the company had paid for the water right, and it is difficult to see how the rule can be different when it was enterprising enough to acquire the right before others realized the value thereof, and expended its money at the risk of not ultimately getting the right. If after it had expended its money it had been enjoined from diverting the water it would have been the loser, and having been fortunate enough to escape that danger it should have the benefit of its success.

"The sale, renting and distributing of the water is a dedication, and brings its use under the control of the state, but it in no sense destroys or abrogates the property rights of the appropriator therein."

*Wilderding vs. Green*, 4 Idaho 773, 45 Pac. 134, 138.

The state having appropriated the water of the company the rates must give a reasonable compensation therefor.

- San Diego Water Co. vs. San Diego*, 118 Cal. 556, 567, 558;  
*Spring Valley W. W. vs. San Francisco*, 124 Fed. 574, 591.



## II.

*The right to collect rates or compensation for the use of water is a franchise, which vested in the company upon its incorporation. Disconnected with any water which the company owned and which it could sell this franchise was only of nominal value, but when the company acquired the absolute right to divert the water the franchise became a valuable property right.*

“In the case at bar the appellant is a corporation, and its franchise to exist and act as such is, unquestionably, assessable only in the City and County of San Francisco. It only remains, therefore, to determine whether it owns and exercises any other franchise, connected with, or incident to, its canals and water system which is assessable in Merced county. The powers conferred by the act under which appellant was incorporated are comprehensive and important. These powers it has, admittedly, exercised and is still exercising. It was thereby clothed with power to acquire property, appropriate and distribute water, construct canals, and to establish, collect and receive rates, water rents and tolls. As an incident to the public uses and franchises it might exercise and acquire, by acceptance or otherwise, it was given the right of eminent domain as a public agent in charge of public uses and franchises. When its corporate organization was completed before it had acquired any property or done any corporate act, it held only the single corporate franchise to exist with enumerated powers. Any other franchise which was offered in the grant of powers and which by proper manifestation of acceptance or exercise of power it might acquire, was inchoate (*Stockton, etc. Co. vs. County of San Joaquin*, 148 Cal. 313). It might, at will,

accept or reject such franchise. When it accepted the offer, and had manifested such acceptance, by the construction of canals, the appropriation and distribution of water and the collection of water rents or rates, the inchoate franchise became complete. The right to collect rates or compensation for the use of its water, thus dedicated to the public use, then became existent as a separate entity or franchise, and rested in appellant as a valuable property right. (*Stockton, etc. Co. vs. County of San Joaquin*, 148 Cal. 313.)"

*San Joaquin, etc. Co. vs. County of Merced*, 2 Cal. App. 593, 599.

"It is, however, earnestly contended for the state that such a franchise is a mere license or privilege enjoyable during the life of the grantee only, and revocable at the will of the state. We believe this proposition to be not only repugnant to justice and reason, but contrary to the uniform course of authority in this country. The laws of this state have made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested them with the attributes of property generally."

*People vs. O'Brien*, 111 N. Y. 1, 41.

"The bridge structure, the stone, iron and wood, was but a portion of the property owned by the bridge company, and taken by the county. There were the franchises of the company, including the right to take toll, and these were as effectually taken as was the bridge itself. Hence, to measure the damages by the mere cost of building the bridge would be to deprive the company of any compensation for the destruction of the franchises. The latter can no more be taken without compensation than can its tangible property."

*Montgomery Co. vs. Schuylkill Bridge Co.*, 110 Pa. 54, 58;

*Monongahela Nav. Co. vs. U. S.*, 148 U. S. 312.

"The apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may be reasonably charged."

*Smyth vs. Ames*, 169 U. S. 466, 544.

In *Spring Valley W. W. vs. San Francisco*, 124 Fed. 594, it is said:

"The complainant contends that an element of value in its corporate property is its franchise. Section 2 of Article 14 of the constitution of the state provides:

"The right to collect rates or compensation for the use of water supplied to any county, city and county, or town or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner provided by law."

"The constitution also provides, section 1 of article 13, that all property in the state not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law; and franchises are declared to be property. Under the constitutional provision and the law passed to carry it into effect the complainant's franchise is taxed by the City and County of San Francisco at a valuation of \$5,395,233. The defendants claim that this franchise has no element of value as property in use by the complainant in supplying water to the City and County of San Francisco and its inhabitants. This claim appears to be based upon an observation made by Mr. Justice Temple in *San Diego Water Co. vs. San Diego*, *supra*, that:

"There is no limit to the number of companies

which may bring water into the city. The franchise is freely offered to all in the constitution. If there are many companies, and thereby the cost and management is increased, this fact would not call for increased rates. The service is worth no more when rendered by ten companies than when one company furnishes all the water.'

"This observation does not appear to have been concurred in by the other members of the court, and it is doubtful if it can be accepted as disposing of the question."

The court then refers to the decision in *Monongahela Navigation Co. vs. United States*, 148 U. S. 312, and then adds:

"It is true this was a condemnation proceeding, and the question was to determine what was just compensation for the appropriation of corporate property to a public use, while the case before the court relates to the fixing of water rates, which shall be a just compensation for the appropriation of complainant's property to a public use. It is not perceived that there is any difference in the principles applicable to the two cases, and this appears to have been the view of the Supreme Court in *San Diego Water Co. vs. San Diego*, *supra*."

*Spring Valley W. W. vs. San Francisco*, 124 Fed. 594.

"In estimating the value of the property of complainant embarked in the business, the commission reached the conclusion that the franchises under which it had laid mains and is delivering gas, and which are part of its property, should be considered as of no value whatever, although the state through the action of its taxing officers, has declared that they are worth several millions of dollars. \* \* \* The reason assigned by the

commission for not including the value of the franchises is that they were granted by the people without compensation. That is so; those franchises were granted very many years ago, at a time when there seemed to have been no intelligent appreciation of the fact that they might become enormously valuable, when reckless improvidence was the rule, and all sorts of franchises were given away, without any provision for securing to the state its fair share of unearned increment thereon. Nevertheless, when the state offers a franchise to whoever will take it without requiring any money return thereon, and for the sole consideration that the taker shall promptly, continuously and fully develop it by the expenditure of his own money, and such offer is accepted, and the terms of the agreement carried out by the taker, there results a contract which, with all consideration of all proper conditions and limitations inherent in the nature of the particular contract, is as much within the protection of the constitution as in all other contracts. If the state 25 or 50 years thereafter shall say to the taker: 'We were very improvident in not providing that you should pay us something each year for this franchise; therefore, hereafter you shall pay us eight (8) per cent annually on \$10,000,000 or \$20,000,000, or we will evict you from the franchise,' it might find itself embarrassed by the provisions of the constitution in thus undertaking to avoid the results of its own improvidence. A franchise, whatever the value may be, which has not expired or lapsed, nor been in some way forfeited, is property in the hands of its holder. There is force in the argument that when the state says: 'We will value this property at several millions of dollars, when we tax you on it, but at nothing at all when we fix the rate you may charge for your product in order to receive an

eight (8) per cent return on your property,' it is seeking to accomplish by indirect methods what it might not be able to accomplish directly."

*Consolidated Gas Co. vs. Mayer*, 146 Fed. 150, 157.

Approved and followed after elaborate discussion in *Consolidated Gas Co. vs. New York*, 157 Fed. 849;

*Wilcox vs. Consolidated Gas Co.*, 212 U. S. 19, 53 L. Ed. 382.

*The right of a water company to have the value of its franchise allowed was sustained and the method of arriving at that value in connection with its water rights and property was fully considered and decided in the case of*

*Kennebec Water Co. vs. Waterville*, 97 Me. 220, 54 Atl. 6.

#### VALUE OF FRANCHISE.

The trial court fully appreciated the correctness of our position on this subject, but held that there was no evidence of the value of the franchise. Of course, a franchise being an incorporeal piece of property cannot be valued like other property, but its value necessarily depends upon many considerations. A canal company has two things: first, its water, and secondly, the means of carrying and distributing the same. If it should sell the water right as a whole it would obviously be entitled to receive the full value of it. If it sold the means of distribution it would receive the whole value of that. On the other hand, if the legislature grants it the right to sell not the water right but the use of the water to various members of the public, that right has the same value as the value of the property, whether the tangible property or the

intangible property, and the legislature having granted the corporation the privilege of renting the use of the water the value of that right is the value of the water itself. The existence of this franchise is admitted and the court is now in possession of the value of all of the tangible property of the company, the additional value which this water has brought to the lands under the canal, the number of acres of land irrigated, the amount such rights sell for elsewhere, and of every fact upon which any valuation of this franchise could possibly be based. Such a franchise is property for the purpose of taxation, is assessed by the county assessors, and such assessment has been upheld by the courts of the state.

*San Joaquin & Kings River Canal & Irrigation Co. vs. County of Merced*, 2 Cal. App. 593.

And still the trial court was entirely unable to reach a conclusion as to its value. The court has, however, held that the water rights of the company are worth \$1,000,000. The owner of that water right goes to the state and gets a charter granting it the franchise to sell, rent and distribute that water to inhabitants of the state, and thereupon dedicates or devotes that property to public use in the exercise of this franchise. If it be admitted that by this process the water right as a distinct piece of property of the value of \$1,000,000 ceased to exist, it must be because it is merged in the franchise, and, if so, the franchise must be as valuable as the water right was before the property was used in connection with the franchise. It is inconceivable that the right to divert water for the irrigation of one's own land is worth \$1,000,000 and that the right to sell the same quantity of water for the irrigation of the lands of other people is worth nothing.

## III.

*The right to divert this water increased the value of the tangible property of the company to the extent of the value of the right to divert the same. The water carried in the canal is as much tangible property as the earthwork and structures.*

A canal without water is absolutely useless. Its value disconnected with water or the right to water is impossible of estimation. The water in a canal is as much part of the canal as the banks and structures. The public enjoy the banks, the structures and the water itself. They are all tangible things. The rights of the canal company to the water may be disregarded and still its physical possession thereof still remains in its canals. The public may not be interested in how the company got the water or what it paid for it, but it is interested in the fact that the company has that commodity in a canal the use of which is offered to the public. If the water is deemed appurtenant to the canal does not the company own that which is appurtenant to that which it owns?

As a general proposition a conveyance of a ditch or canal will carry the *water right* which has been enjoyed by means thereof without special mention.

*Fudickar vs. East Riverside I. Dist.*, 109 Cal. 29;  
*Lower Kings, etc. Co. vs. Kings River, etc. Co.*,

60 Cal. 408;

*Williams vs. Harter*, 121 Cal. 47.

This is on the theory that the water is appurtenant to the ditch, but in one case the court pointed out that

“The water right is the principal thing, and if either is appurtenant to the other, the ditch is appurtenant to the water right.”



And the court also held that the water

“does add to the value of *the ditch*.”

*Jacob vs. Lorenz*, 98 Cal. 332, 340.

But it is not important to consider which is the principal thing and which the appurtenance; they together form one whole which in ordinary parlance is comprehended by the word canal or ditch in the same way that the word river includes the channel and also the water. The value, therefore, of this thing must include all its parts—the dam, the banks, the structures, the water. The *water* as distinguished from the abstract right to divert it, is *tangible* property as much so as the canals and structures and the company as much entitled to a return on the value of that commodity.

“Water courses are either natural or artificial. Plaintiff’s ditch was an artificial watercourse. ‘A watercourse consists of bed, banks *and water*.’”

*Lower Kings River, etc. Co. vs. Kings River, etc. Co.*, 60 Cal. 408.

What complainant furnishes to the public is not a *water right*, but *water*. The water when appropriated by complainant and diverted into its canals is personal property, and the *corpus* of the water becomes its property.

“Sec. 773: *Title to the water after diversion*. After the diversion of the water from the natural stream into the ditches, canals, pipes, reservoirs, or other works of the appropriators, the title to the same changes, and the body or corpus of the water becomes the absolute property of the appropriators. Water, when collected in the works of the appropriator, and thus separated from the original source of supply, is considered his in-

dividual property, as much as the fish which might have been lawfully captured from the depths of the natural stream or the wild fowl which might have been shot or captured on its surface. In fact, it is a general principle of law that where an individual by his labor reduces to his control or use any object, animate or inanimate, which otherwise could not be brought under the control or use of man, that he acquires a right of property in such object, from which he cannot be unlawfully dispossessed. One of the most apt illustrations of this proposition used by the authorities is that of the fish and fowl. As said by Mr. Justice Field, in the Supreme Court of the United States: 'The wild fowl in the air belongs to no one, but when the fowler brings it to the earth and takes it into his possession it is his property. \* \* \* So, when the fisherman drags by his net fish from the sea, he has property in them, of which no one is permitted to despoil him.' So it is with water. While it is flowing naturally in the channel of the stream or other source of supply, it 'is a movable, wandering thing, and must of necessity continue common by the law of Nature,' and, therefore, is nobody's property, or property common to everybody. After it has been captured, as it were, or diverted from the natural channel of the stream by an individual, and taken absolute possession of by him in the ditches, canals, reservoirs, or other receptacles constructed or prepared by his work and labor, it is as much his private property as anything else that is reduced to possession which otherwise would be lost to the uses of man. And, furthermore, this is not a rule peculiar to the Arid Region Doctrine of appropriation, but it is the universal rule under the civil law. It is also the rule under the Western doctrine of appropriation."

*2 Kinney on Irrigation and Water Rights, Sec. 773.*

## IV.

*The water rights owned by complainant have added to the value of its property as a "going concern" to the extent of the value of such water rights.*

The complainant, beyond having the ownership of the mere physical structures, undoubtedly has the following things:

1. A priority of appropriation of water;
2. An adequate supply of water to fill its canals;
3. Available land under its canals which has been colonized and successfully farmed and which needs and demands the water;

4. Lateral ditches constructed by the owners of these lands, costing many thousands of dollars for the purpose of having the water carried from the canals to the land;

5. An assurance of a continued demand for the water, thus taking the business out of the category of a mere enterprise, and placing it on the basis of an assured financial success.

These things as a whole give to these properties owned by the company a value as part of a "going concern," which value exceeds the value of the structures based on the mere physical cost of reconstruction, and the value of property by reason of being part of a "going concern" is to be considered in fixing the rates which should be allowed.

*National City W. W. Co. vs. Kansas City*, 62 Fed. 843;

*Gloucester Water Supply Co. vs. Gloucester*, 179 Mass. 364;

*Norwich Gas Co. vs. Norwich*, 76 Conn. 565;

*Kennebec Water Dist. vs. Waterville*, 54 Atl. 19;

*Venner vs. Urbana Water Works*, 174 Fed. 348;

*Omaha vs. Omaha Water Co.*, 218 U. S. 991, 54 L. Ed. 991.

In the *Omaha* case last above cited this court expressed the matter as follows:

"The appraisers, in making their estimate of valuation, included \$562,712.45 for the 'going value.' This separation of an element contributing to the value of each tangible part was done because required to be done under an order made in the circuit court in a suit in which the water board of the City of Omaha was complainant and the members of the board of appraisers and the water company were defendants. The object of that suit was to instruct the appraisers in respect to the mode and manner in which they should proceed. An order resulted which required the board to report the separate elements making up the aggregate value of the plant.

"The option to purchase excluded any value on account of unexpired franchise; but it did not limit the value to the bare bones of the plant, its physical properties, such as its lands, its machinery, its water pipes or settling reservoirs, nor to what it would take to reproduce each of its physical features. The value, in equity and justice, must include whatever is contributed by the fact of the connection of the items making a complete and operating plant. The difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers. That kind of good will, as suggested in *Wilcox vs. Consolidated Gas Co.*, 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct. Rep. 192, is of little or no commercial value when the business is, as here, a natural monopoly, with which the customer must deal, whether he will or no. That there is a difference between even the cost of duplication, less depreciation, of the elements making up the water company plant, and the

commercial value of the business as a going concern, is evident. Such an allowance was upheld in *National Waterworks Co. vs. Kansas City*, 27 L. R. A. 827, 10 C. C. A. 652, 27 U. S. App. 165, 62 Fed. 853, where the opinion was by Mr. Justice Brewer. We can add nothing to the reasoning of the learned justice, and shall not try to. That case has been approved and followed in *Gloucester Water Supply Co. vs. Gloucester*, 179 Mass. 365, 60 N. E. 977, and *Norwich Gas & Electric Co. vs. Norwich*, 76 Conn. 565, 57 Atl. 746."

The increased value of this property by reason of being part of a "going concern" can be reached by the same method which we have used in fixing the value of the franchise and water right of the company.

#### REVIEW OF DECISION IN CASE AT BAR.

The opinion of Judge Morrow on the question under discussion in the case at bar is found in Vol. 1 of the Record, pp. 215-225. He states that the Circuit Court of Appeals in the *Souther* case, following the decision of the Supreme Court of California in the *Park* case, "held valid a contract exacting a sum of money in addition to the legally established rate for the so-called water right," and that in the *Souther* case "Judge Ross yielded to that decision," but says:

"But in the subsequent case of *Boise City Irr. & Land Co. vs. Clarke*, 131 Fed. 415, in the Circuit Court of Appeals, Judge Ross, being then a member of the court and writing its opinion, adhered to his original opinion in the *San Diego* case in passing upon the validity of certain water right contracts."

The opinion also admits that the *Bachman* case "reaffirms the doctrine of the *Park* case," but states that

"The question here is whether the constitution in declaring that the use of all water appropriated for sale, rental, or distribution to the public use attaches the water right to the land for which the water is appropriated."

The answer to this is that no particular land is entitled to the water: One piece of land may receive it today and another piece tomorrow. (*San Joaquin, etc., Co. vs. Sterinson*, 164 Cal. 221.) The title of the water company, although inchoate, attaches as soon as it posts its notice of appropriation or begins construction, although no individual may have yet used it, and this is a property right (*Inyo Consolidated Water Co. vs. Jess*, 161 Cal. 516). It is true that before the right becomes complete the water must be applied to a beneficial use, but the sale, rental and distribution of the water is itself a beneficial use. (*Montecito Valley Co. vs. Santa Barbara*, 144 Cal. 578, 593).

Ownership of the water by the company is the very basis of the fact that it is charged with a public duty.

"It must be admitted that a person, natural or corporate, cannot be said to be in charge of the administration of a public use of water unless such person either owns or controls some water which is the subject of the use."

*Hildreth vs. Montecito Creek Water Co.*, 139 Cal. 22, 26.

And the acquisition of title to the water precedes the dedication or appropriation of it to a public use

*Thayer vs. Cal. Dev. Co.*, 164 Cal. 117.

**RIPARIAN RIGHTS ARE WELL ESTABLISHED IN CALIFORNIA AND MUST BE EXTINGUISHED BY CANAL COMPANY.**

It seems to us that the first error which the court has fallen into in discussing this question is in comparing conditions in California with conditions in a state like Colorado, where the riparian doctrine is not recognized, and therefore where the state had full authority to and had itself declared the waters to be public property. In California the right of riparian owners to the full benefit of the flow of the stream is now too well settled to require any citation of authority. In this particular case the largest riparian owner on the stream was Miller & Lux, and the evidence shows that from the earliest date Miller & Lux has always asserted its riparian rights in the waters of the streams of the State of California, and particularly of the San Joaquin river. This is not only shown by the evidence, but is also shown by the numerous decisions of the courts of the State of California, beginning with the case of *Lux vs. Haggin*, 69 Cal. 255, and continuing to the last volume of reports of the Supreme Court of California. The reports of that state are full of cases where canal companies have started an enterprise of taking water from the streams in that state, and have often spent large sums of money only to have their diversion enjoined by riparian owners. The limits of this brief will not permit of a citation of all of those cases. A few of the latest ones, however, may be of interest. For instance, in the case of *Miller & Lux vs. Madera Canal & Irrigation Company*, 155 Cal. 59, it appeared that the defendant canal company had completed a reservoir on Fresno river, one of the tributaries of the San Joaquin river, for the purpose of storing flood and storm waters of the river, and in doing so had expended over sev-

enty-five thousand dollars. Nevertheless at the suit of the plaintiffs, as riparian owners, the storage and diversion of the water was enjoined. In the latest case of *Miller vs. Bay Cities Water Co.*, 157 Cal. 256, it appeared that the defendant company had constructed most extensive works for the purpose of reser-voiring the flood waters of Coyote creek for the purpose of supplying the City and County of San Francisco, and other places, with water. Many hundreds of thousands of dollars were expended in the enterprise. Nevertheless, at the suit of an owner whose property was situated over an underground water strata, which was fed and raised by the pressure of the flow of the water in Coyote creek, this storage and diversion of water was enjoined. These are only two of the illustrative cases showing the absolute insistence and the proper insistence by riparian owners that they shall not without compensation be deprived of their vested rights in the streams of the state. In fact, under the decisions in that state the riparian owner is the absolute owner of the stream as a part and parcel of his land. The state has no right, title or interest in that water, and has no right to permit its appropriation by any one, and the right of the riparian owner is a vested one, which cannot be taken away without due compensation.

#### **RIPARIAN RIGHTS EXTINGUISHED BY CONDEMNATION.**

In the case of *Lux vs. Haggin*, 69 Cal. 255, in which these rights were first definitely fixed and determined, the court, after holding that riparian rights were vested and could not be taken away without just compensation, pointed out that such rights could be condemned for the use of the public (see 69 Cal., p. 299), and the court very clearly pointed out, in language



too long for quotation, that if the legislature found it necessary to obviate any inconvenience growing out of the doctrine of riparian rights, that inconvenience to a large measure could be removed by enacting legislation permitting the condemnation of those rights for the benefit of the public.

In the case of *Miller & Lux vs. Madera Canal & Irrigation Company*, 155 Cal. 59, 64-65, the court referred to the same matter and said:

"If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain. The argument that these waters are of great value for the purposes of storage by appropriators and of small value to the lower riparian owners defeats itself. If the rights sought to be taken be of small worth the burden of paying for it will not be great. If, on the other hand, great benefits are conferred upon the riparian lands by the flow there is all the more reason why these advantages should not without compensation be taken from the owners of these lands and transferred to others."

In fact, from our study of the question of water rights in the State of California we have reached the view that in any case where the riparian doctrine is working a hardship for the reason that a greater use could be made of the water than is made by the riparian owners, the only way in which the inconvenience can be removed is by applying the right of acquiring the riparian rights by condemnation. In fact, it appears from the record in this very case that, although the complainant has been diverting water ever

since 1872, as late as 1899 an injunction was obtained against it in the case of *Stevinson vs. San Joaquin & Kings River Canal & Irrigation Co.*, 162 Cal. 141, from diverting more than a given quantity of water. For the purpose of obviating that restriction, the complainant has instituted in the Superior Court of the County of Merced a proceeding in eminent domain against the Stevinson interests for the purpose of condemning the riparian rights of the Stevinsons to the extent of permitting a further diversion of water by the complainant (see *San Joaquin & Kings River Canal & Irrigation Co. Inc. vs. James J. Stevinson*, 164 Cal. 221). In that suit the defendants are claiming compensation for their rights in the sum of nine million dollars. We do not anticipate that the court will allow them any such amount; that it will allow some damages is certain. In the case at bar the undisputed evidence is that every cubic foot of water is worth three thousand dollars, and, while that is not all appurtenant to the Stevinson land and therefore we will not have to pay them any such sum of money, if acquired as against all the riparian owners the damages would undoubtedly be very great. The result of this is that the courts of the State of California have held that the riparian owners and not the public own the right to the flow of the water. The courts of the State of California have told the people of California that if they desire to acquire these rights they may authorize canal companies by eminent domain to acquire the same, and we respectfully submit that the court in deciding this matter has proceeded on the assumption, not that the riparian owner owns the water, but that the public owns the water, and by the decision herein (which holds that if a canal company should condemn these riparian rights and

should pay therefor it could not obtain any return thereon), this court has taken away from the people of the State of California the only remedy which the courts of the state have held is available to overcome the impediments to the use of water growing out of the riparian doctrine.

#### COLORADO CASES.

The court also cites certain cases from the State of Colorado, but in doing so the court has entirely overlooked the fact that the entire framework of the law of that state in regard to water is different from the law of the State of California. In that state the riparian doctrine has been held not to prevail, and that left the state clear to make such disposition of the water as it saw fit. Under that power the people in the constitution of Colorado, article XVI, section 5, provided :

"The water of every natural stream not heretofore appropriated within the State of Colorado is hereby declared to be the property of the public and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."

The court will readily see that this was a declaration that could not be made in the State of California, and the effect of that was *ipso facto* to dedicate all of the water to the use of the people of the state, and the statutes providing for the formation of canal companies simply formed them "for the purpose of carrying water for irrigation purposes" (Laws of Colorado 1891, p. 96; sec. 1). It was therefore entirely natural that the courts should hold that the companies were mere carriers of a commodity already owned by the public. But all the courts recognize that this does not apply to California.

*Fresno Canal Co. vs. Park*, 129 Cal. 437, 445-6;  
*Wilterding vs. Green*, 4 Idaho 773, 45 Pac. 134;  
*San Diego Flume Co. vs. Souther*, 90 Fed. 164.

See also opinion of State Railroad Commission in *Palmer vs. Southern Cal. Mountain Water Co.*, Decision No. 418, decided Jan. 21, 1913.

#### AGENCY THEORY.

The court in its opinion has elaborately discussed the theory that a canal company in the State of California is a mere agent for the owners of the land, and that the owners of the land are the owners of the water. The theory of agency necessarily presupposes two things: namely, a principal and an agent. The principal supplies the financial assistance necessary, lays out the general plan of the work, and has complete control and direction over the agent, and bears all of the losses of the venture and receives all of the benefits, except such compensation as the agent may receive by agreement. On the other hand, the agent is subject to no responsibility in case of loss in the absence of some wrongful act, and is entirely subject to the control of the principal and receives no benefit from the success of the enterprise, except such compensation as may be agreed upon. In the case of a canal company the canal company and not the land owner contributes all of the financial assistance. It is subject to the control of no one in proceeding to acquire its properties and construct its system. If it constructs its canals as plaintiff did at the expense of many thousands of dollars, and after it has constructed them a riparian owner or appropriator enjoins it from diverting the water of the stream, all of the loss falls upon the canal company; or if it succeeds in diverting the water and the public fails to patronize the company it has no redress against any

one, but must suffer all the losses of the enterprise. Again it may today sell water to a particular tract of land and if the owner of that tract of land abandons it tomorrow, he owns no water and no water right which he can assign and transfer to any other person, but the company can proceed to sell the same to some other member of the public. If other members of the public demand the water it may sell it to them and divide the water between the various members of the public in case of a shortage. According to the latest decision of the Supreme Court of California the first taker of the water has not even any prior right as against other members of the public who subsequently purchase it. (*Leavitt vs. Lassen Irrigation Co.*, 157 Cal. 82.) We feel that we can safely assert that there is not a case in the history of irrigation in the State of California where the canal company appropriating and diverting water has not been held to be the owner of the water in every form of litigation in which that question has arisen. Can there be any question that such a company appropriating water would have a right to go into court for the purpose of protecting its right to divert the water appropriated, and how could it do so under the law unless it was the owner of the appropriation? This reasoning may apply in a state like Colorado, where the state has declared all "unappropriated" water to be the property of the people and where a company is simply organized for the purpose of carrying water, but in a state like California, where the company must first acquire the water by purchase, condemnation, or prescription before it can be secure in its right to divert the same at all, and where it must bear the entire loss in case of failure, to hold the company to be an agent and at the same time subject to all the responsibility of a principal would be an injustice which the court should not countenance.

**RETURN ON WATER RIGHTS PERMITTED IN OTHER CASES.**

In other important cases in the court in which this case was decided companies have been held to be entitled to a return upon their water rights. Judge Morrow allowed such a return in a case of much more relative importance than the case at bar, namely: the case of *Spring Valley Water Works vs. San Francisco*, 124 Fed. 574, 591. Judge Van Fleet, now judge of the United States District Court of the same district allowed such a return when Associate Justice of the Supreme Court of the State of California in the case of *San Diego Water Co. vs. San Diego*, 118 Cal. 556, 567, and within a month after the decision in this case, Judge Farrington, United States District Judge for the District of Nevada, sitting for Judge Morrow in the Circuit Court of the Northern District of California, in the case of *Spring Valley Water Works vs. San Francisco*, 192 Fed. 137, allowed a return on water rights of that company valued at several millions of dollars. In the opinion in that case the court will find separate valuations placed upon each of the sources of supply of that company, and it is stated in the opinion that all of the parties to the litigation conceded that the company was entitled to a fair return upon the value of its water rights. In fact, when the Spring Valley Water Company acquired the various streams which ultimately formed the Crystal Springs reservoirs, when it instituted the condemnation proceedings of *Spring Valley Water Works vs. San Mateo Water Works*, 64 Cal. 123, if any one had told the originators of that company, no matter what they paid for that water, which was the actual life of the City and County of San Francisco, they never could get a return on the outlay, we doubt whether they or any other concern would have invested their money in the

enterprise. When those companies commenced drawing water out of the gravel beds of Alameda county, thus depriving hundreds of acres of land of an underground water supply to which the land was entitled (*Katy vs. Walkinshaw*, 141 Cal. 123), and when they paid thousands of dollars in damages in order to entitle them to abstract that water, if they had been told by an authoritative decision of the courts of the state that they would never be entitled to any return thereon, it would certainly have been difficult for them to have raised money to invest in such a charitable enterprise. As the court well knows, all enterprises of this kind at the present day must be financed by means of bonds, salable on the open market. Suppose the complainant in this case were incorporated for the purpose of carrying out this enterprise, and should have acquired its water rights by condemnation, and issued bonds for the payment of the water rights and for the construction of its works, could those bonds ever have been sold if endorsed on each of them was an authoritative decision of the courts of the state to the effect that at no time and under no circumstances could the company ever receive from the public any return whatever upon the money thus invested? In the case at bar, every year the complainant must pay dividends upon one hundred and twelve thousand five hundred dollars of stock, which was issued in 1871 in payment of water rights then acquired by the company, but still the court says that it is entitled to no earning whatever upon that same one hundred and twelve thousand five hundred dollars worth of water rights.

In the case at bar the complainant company every year must pay to Miller & Lux several thousands of dollars in the way of reduced charges for water guaranteed to that company by the contract entered into by the predecessor in interest of complainant in 1871

before the company could divert any water from the river. The court in its judgment herein charges the complainant with receiving the full rates from that company, although it has not received them and cannot receive them in view of the contract, which was entered into at a time that Miller & Lux had no control of any kind over the canal company (Trans. p. 245), when they were standing at arms length, one of them desiring to divert the water and the other in a position to absolutely prevent such diversion. At the time of the entering into of that contract it was recognized by the canal company that it, like every other canal company, would have what is generally known as surplus water; that is, water in its canals which would not be demanded by the public for the irrigation of their lands. On the other hand, Miller & Lux, the riparian owner, had a large quantity of wild land which had theretofore been flooded from the natural overflow of the river, but which would probably be more or less deprived of that overflow by the diversion through the canal, and it was therefore arranged that this surplus water when not demanded or required by the public should be wasted out on those lands without the canal company being liable for damages for doing so, and without Miller & Lux being liable to pay therefor. It should be remembered in this connection that extensive canals of this kind are not built for the purpose of flooding wild land, nor could that character of land afford to pay such water rates as may be paid by land which is cultivated and irrigated. No one can doubt the entire reasonableness of this contract, which was in fact entered into between people entirely separate and distinct and each trying to drive the best bargain possible. Still the court charges the canal company with having annually received the value of this water discharged onto this wild land, estimated at \$10,000, although the company never has and never



could receive it under these contracts, and without those contracts it never could have diverted a drop of water from the river. And still it holds that the company acquired no water rights by virtue of those contracts.

#### PUBLIC IRRIGATION DISTRICTS.

This matter is made still more clear when considered in analogy to irrigation districts formed under the Write Irrigation Act (Stats. Cal. 1887, p. 29), or when considered with reference to municipal water supplies. In both of these cases it is well recognized that these municipal corporations and irrigation districts may acquire water rights by purchase or condemnation, and it is contemplated that in payment of those water rights bonds of the district or municipality may be issued. At any rate the court can readily see that if a public irrigation district had initiated this enterprise and had acquired and paid for water rights, those water rights in turn would have been paid for by the irrigators or by the public. What reason can be suggested why the public should pay for the water rights when the public themselves acquire them, and should not pay for them when they are acquired by a canal company acting as an agent for the public? The most elementary principle of agency is that if the agent does any thing for the benefit of the principal he is entitled first to be fully reimbursed for all his outlays, and secondly to a reasonable compensation for his services, but here the court permits the public, which is the supposed principal, to take the full benefit of what the agent has acquired for it, and not only refuses to reimburse the agent for the money which it has expended, but also refuses to give it any return for its services in acquiring the property.

## ACQUISITION OF WATER RIGHTS.

At the time complainant's system was inaugurated it was, and still is, the law of this state that the riparian owners on the river are entitled to the flow of the stream, and that no one was entitled to take the water as against a riparian owner, and that the only way that such right could be acquired was by purchase, condemnation, or prescription. There was no evidence introduced as to the exact nature of the "water rights" purchased from John Bensley and the others who inaugurated the project, and, in fact, the parties at this time being all dead, such evidence was not available, but in view of the fact that the evidence shows that as early as the formation of the company in 1871 the company which was incorporated in 1864 had constructed works of the value of \$119,000, and had water rights which were considered at that time to be worth \$112,500, it must be assumed at this late day that the price at which the works and water rights were sold was the reasonable value thereof. (*Wilcox vs. Consolidated Gas Co.*, 212 U. S. 19, 53 L. Ed. 382.) From this it may readily be assumed that by appropriation and subsequent diversion, or by purchase of existing appropriations, or by purchase from the riparian owners, or by some other method, the originators of this project had at that time acquired water rights of the value mentioned. In this connection, it might be mentioned that both in the master's report and in the argument of counsel it is suggested that it cannot be assumed that the \$112,500 was paid for water rights, for the reason that on the books it appears that that sum was paid "for water rights, etc." If this stood alone there might be some merit in the contention, but it appears that there were two payments made at the time; one for "cost of works" and the other "for water rights, etc." Now, the works would obviously include

the dams, canals, structures, and land used for right of way for the same, and therefore the payment of \$112,500 could only have been for water rights, the word "etc." evidently meaning things of the same nature as water rights, such as appropriations, water, riparian rights, etc.

#### AGREEMENTS WITH RIPARIAN OWNERS.

It further appears that the principal riparian owners on the river were Miller & Lux (Trans. p. 343) and the California Pastoral & Agricultural Company (Trans. p. 349), and it appears that the company proceeded to obtain the consent of those owners to the diversion of this water. The first contract is dated the 18th day of May, 1871, between the original company, San Joaquin & Kings River Canal Company, and Miller & Lux (Exhibit 6), and recites that the canal company is organized for the purpose of constructing a canal on the west side of the San Joaquin river, and agrees to construct it for at least sixty (60) miles before January, 1872, and for a further distance to the Western Pacific Railroad by the first of April, 1872. In consideration of that agreement, Miller & Lux granted a right of way for the canals, and further agreed that after sufficient water had been furnished for the irrigation of fifty thousand (50,000) acres of land they would pay the company a subsidy of twenty thousand dollars (\$20,000). The company further agreed to furnish Miller & Lux water for irrigation, and Miller and Lux agreed that "they will pay "the said party of the first part for each crop a sum "not exceeding one dollar and twenty-five (\$1.25) "cents per acre, or the prices paid by other parties for "every acre of their said lands actually irrigated by "them from the waters of said canal." The contract further provided that "for the purpose of enabling the

"party of the first part to carry out its enterprise, and "effectuate its designs aforesaid, it is further agreed "that it shall have the use and benefit of all sloughs "between said canal and the San Joaquin river on the "said lands of the parties of the second part." These sloughs were evidently for the purpose of discharging the surplus water out of the canal back to the river, as appears by the next paragraph:

"And it is further agreed that should the said canal diminish the natural overflow which usually occurs between the first day of April and the fifteenth day of June of the San Joaquin river and its sloughs upon the said lands of the said parties of the second part, then the said party of the first part shall at any time between said months open the gates of the said canal at the request of the parties of the second part and, free of charge and expense to them, permit an overflow from the said canal on said lands equal in quantity of water to that of which they were deprived as aforesaid."

The company also agreed to construct bridges across the canal not less than twelve feet wide for every six miles at such points as Miller & Lux might designate; and also provided that Miller & Lux should not be responsible for damages to the canal by cattle, and also provided that the canal company should give Miller & Lux "a sufficiency of water from said canal "for their cattle, and for all domestic purposes for "themselves, their tenants and employees, free of "charge."

After the formation of the new company a new contract (Exhibit 7) was entered into dated the 7th day of February, 1872, between Miller & Lux and the new company abrogating the first contract, and providing that in lieu of the subsidy Miller & Lux

gave two promissory notes for six thousand six hundred and sixty-six dollars (\$6,666.00), and agreed to pay the further sum of six thousand six hundred and sixty-six dollars (\$6,666.00) when fifty thousand (50,000) acres of land were irrigated. The other provisions of the contract were largely the same as the original contract, but it provided that Miller & Lux "agree to pay to said party of the first part for water "furnished by it used in irrigating each crop the regular price paid by others for irrigation not to exceed "one dollar and twenty-five cents per acre for each "acre so irrigated of land owned by said party of the "first part." It also provided:

"It is further agreed by and between the parties hereto that in case the canal of the said party of the first part shall diminish the natural overflow of the San Joaquin river and its sloughs which usually occurs between the 1st day of April and the 15th day of June in each year upon the lands of said party of the first part, then and in such case said party of the second part shall at any time at the request of said party of the first part between said dates, and free of charge and expense to them, permit an overflow from the said canal upon said lands equal to that of which they shall have been so deprived as aforesaid."

It appears that shortly after this disputes arose between Miller & Lux and the Canal Company as to the meaning of these contracts and litigation was instituted in regard thereto, which was finally settled and terminated by an agreement dated the 12th day of November, 1879 (Exhibit 8), which, among other things, construed the original contract to mean that the Canal Company

"will deliver water therein at its regular rates, not exceeding one dollar and twenty-five cents

(\$1.25) per acre per crop provided the crops are cut, but in case the alfalfa lands should be pastured then each supply of water of the usual quantity supplied to produce a crop shall be deemed to be such a supply as will entitle a charge to be made therefor, the same as if the crop shall be cut."

It appears that from the time of the execution of this contract the Canal Company continued to divert water from the river until the 17th day of August, 1898, when another contract (Exhibit 11) was entered into between the Canal Company, the California Pastoral & Agricultural Company and Miller & Lux, which contract recited that

"differences have arisen between the parties hereto as to the rights of the parties of the second and third parts hereto to take water from the said San Joaquin river, and also as to the amount of water they are each entitled to take and receive from the said river, and as to their priorities in such water."

For the purpose of settling and adjusting those differences it was agreed that the Canal Company might first take from the river seven hundred and seventy-five cubic feet of water per second; that after that amount of water had been taken by the Canal Company, the Chowchilla canal should be entitled to take one hundred and twenty (120) cubic feet of water per second. This agreement further provided:

"It is understood that this agreement neither fixes nor limits any rights of Miller & Lux, the party of the third part hereto, to the water flowing in said San Joaquin river after the diversion therefrom of said quantities of seven hundred and seventy-five (775) feet and one hundred and twenty (120) feet herein provided for."

This contract was followed by a contract dated the 4th day of June, 1901 (Exhibit 12), between the Canal Company, Miller & Lux, California Pastoral & Agricultural Company and others, by the terms of which the previous agreement, dated August 17, 1898, was ratified and confirmed, and

"2. Subject to the provisions of said last mentioned agreement and also subject to the provisions of that certain other agreement between the parties of the second and third parts hereto, bearing date the 18th day of May, 1899, the said party of the third part (the Canal Company) shall have the right at all times to divert from the said San Joaquin river thirteen hundred and fifty (1350) cubic feet of water per second.

"3. Subject only to the diversions provided for in the said two agreements and in the second paragraph of this agreement the said party of the second part (Miller & Lux) shall at all times have the right to divert from the said San Joaquin river so much water as it may desire."

It also appears that the diversion by the Canal Company of water from the river has been done openly, continuously, uninterruptedly, and under a claim of right, for much more than the statutory period sufficient to constitute a title by prescription (Trans. p. 344), and that the only riparian owner who has ever brought any suit to enjoin such diversion is J. J. Stevinson, who brought such a suit in the year 1899 (Trans. pp. 343-4). As a result of that suit it was adjudged that for more than five years prior to the 15th day of August, 1899, the Canal Company had diverted and acquired a prescriptive right to divert seven hundred and sixty (760) cubic feet of water for the irrigation of non-riparian lands, and that beside that it was entitled to divert a reasonable quantity of water from the river for the irrigation of riparian lands (Exhibits 24-5).

There is one other contract between Miller & Lux and the Canal Company which has an important bearing on the case, to-wit: the contract dated the 18th day of May, 1899 (Exhibit 10), which reads as follows:

"THIS AGREEMENT, made this 18th day of May, 1899, by and between The San Joaquin and Kings River Canal and Irrigation Company, a corporation organized and existing under the laws of the State of California, the party of the first part, and Miller & Lux, also a corporation organized and existing under the laws of said state, the party of the second part.

"WITNESSETH: That, whereas, prior to the construction of the canal of the party of the first part, Henry Miller and Charles Lux were the owners of lands lying along and bordering upon the San Joaquin river, and its sloughs, in said state, and lying above and below the head of the canal of the party of the first part, and were the owners of riparian rights in and to the waters of said river and sloughs, and had been accustomed to and did actually use the waters of said river and sloughs which naturally overflowed said lands, and also to take water therefrom by artificial means, for the purposes of irrigating said lands and furnishing water for their cattle and live stock and for other domestic uses, in accordance with their said riparian rights;

"And, whereas, said Henry Miller and Charles Lux, for the purpose of aiding the construction of said canal of the party of the first part, did pay to the party of the first part a subsidy in money, and conveyed to it a right of way for its said canal where the same passed through the lands of said Henry Miller and Charles Lux of a width of one hundred (100) feet on each side of the center line of said canal, and permitted the party of the first part to appropriate and divert from said river through said canal eight hundred



(800) cubic feet per second of the water flowing in said river;

"And, whereas, at all times since said appropriation was made by the party of the first part said Henry Miller and Charles Lux, and said Henry Miller, as the survivor of them, and the party of the second part (as the successor in interest of said Henry Miller and Charles Lux) continued, as said riparian owners, to use the overflow waters of said river and sloughs upon said lands for the aforesaid purposes, and also to use, for the purpose of irrigating uncultivated land, and furnishing water for their live stock and for other domestic uses, and with the consent of the party of the first part, and without any charge therefor by it, the surplus water running in said canal not used or required by the water consumers of the party of the first part other than said Henry Miller, Charles Lux, and the party of the second part;

"And, whereas, during all said times it was understood by all said parties that said Henry Miller and Charles Lux, and said Henry Miller, as the survivor of them, and said party of the second part, as the successor in interest of them, were of right entitled to the said use, without charge, of the said surplus water in said canal; and that said party of the first part was of right entitled to waste said surplus water on said uncultivated lands;

*"And, whereas, the party of the second part has agreed to permit the party of the first part to appropriate and divert from said river, through its "Outside Canal," three hundred and fifty (350) cubic feet per second of the water flowing in said river, in addition to the aforesaid eight hundred (800) cubic feet per second;*

"Now, therefore, in consideration of the premises, and to the end that the rights of the respective parties hereto, as heretofore understood

and recognized, may be fixed and established, the party of the first part does hereby confirm unto said party of the second part the right to use, for the purposes of irrigating the said uncultivated lands above referred to, and of furnishing water for its cattle and live stock, and for other domestic uses, free of cost or charge to it, all or so much of the surplus water running in the canals of the party of the first part as the party of the second part may desire to use for said purposes, and which may not be used or required by the other water consumers of the party of the first part; and said party of the second part does hereby confirm unto said party of the first part the right to waste said surplus water on said uncultivated land.

"And the party of the first part does hereby acknowledge and declare that it has no claim to make against the party of the second part, or its predecessors in interest, on account of the use heretofore made by it and them of said surplus water."

Besides this the company has entered into contracts with the power company for the reservoiring of the water of the river, which will increase the available flow in the late summer (Exhibits 19 and 22).

It results from this that the Canal Company has acquired in the course of its history and existence the following rights:

1. It has succeeded by purchase to the rights of the old San Joaquin & Kings River Canal Company, organized in 1864, and the rights acquired by John Bensley and the other organizers of that company prior to the year 1871.

2. It has acquired against Miller & Lux, the largest riparian owner on the river, by express grant the right to divert thirteen hundred and fifty (1350) cubic feet of water per second.

3. It has acquired against the California Pastoral & Agricultural Company, the second largest riparian owner on the river, the right to divert seven hundred and seventy-five (775) cubic feet of water in the river and after diversion of one hundred and twenty (120) feet by the California Pastoral & Agricultural Company to divert an additional quantity up to thirteen hundred and fifty (1350) cubic feet.

4. It has acquired by prescription, and had determined by judicial proceeding against J. J. Stevinson, the only other riparian owner who has called its rights in question, the right to divert seven hundred and sixty (760) cubic feet of water for the irrigation of non-riparian lands, and the right to divert from the river a reasonable quantity of water for the irrigation of riparian lands, of which, it appears, there are many thousands of acres under its canals (Trans. p. 557).

5. It has acquired by prescription against all other riparian owners and by appropriation against the world the right to divert the quantity of water which the evidence shows it has diverted into and through its canals for much more than five years, to wit: thirteen hundred (1300) cubic feet of water per second.

#### **COST OF WATER RIGHTS.**

The next question that arises is what did these water rights cost the Canal Company to acquire?

1. In the first place, as we have shown, it appears as we contend that it paid John Bensley and others for the rights which they had in 1871 the sum of one hundred and twelve thousand five hundred dollars (\$112,500).

2. In the second place, it appears that by the contract with Miller & Lux the Canal Company agreed to furnish water to them for one dollar and twenty-five cents (\$1.25) per acre. It appears that at that

time the company was selling water to others for two dollars and fifty cents (\$2.50) an acre. It appears that since that time the Canal Company by reason of this contract has lost an average of \$12,495.77 a year. This when capitalized at 6% amounts to \$208,263. Deducting from this the subsidy paid, \$20,000, leaves a net loss of \$188,263 (Trans. p. 345).

3. These contracts, as we have shown, also gave Miller & Lux the following rights:

(a) The right to free water for stock and domestic purposes;

(b) The right to have their grass lands flooded by the surplus water in the canal. The Canal Company was also given the correlative right to discharge its surplus water into the sloughs on the land of Miller & Lux.

The court has held that the right granted to Miller & Lux to have this surplus water is worth \$10,000 a year, *and the company is actually charged with the receipt of that amount.* Capitalizing that amount at six (6) per cent would make the value of that right \$166,666. It therefore results from this that the Canal Company has actually paid over four hundred and sixty thousand dollars (\$460,000) for its water rights. So far as the amount paid to Bensley is concerned, the company is still dividing its profits with the holders of the Bensley stock, which was issued to them in payment of the one hundred and twelve thousand five hundred dollars. So far as the annual advantage to Miller & Lux is concerned, the company loses that every year, and in figuring the amount which the company will be presumed to obtain under the rates fixed by the law, the court has charged the company with the full rate just as if it collected it, but has allowed no credit to the company for that which it got in consideration of this reduced rate. In the same way the court has charged the company with ten thousand dollars a year for this waste water discharged upon

Miller & Lux's grass lands, although the company has not collected that amount, and cannot collect it under the contracts, and still the court has credited to the company nothing which it got in consideration of that concession to Miller & Lux. All this is justified by the court and by counsel for the defendants for the reason that the original contracts with Miller & Lux did not in express words grant to the Canal Company the right to divert this water from the river. This seems to us a very narrow construction of those contracts. It must be perfectly obvious to the court that those contracts were entered into with Miller & Lux for the reason that Miller & Lux had land which was riparian to the river and which was entitled to the waters of the river, even to the extent of the natural overflow from the river and sloughs, as recited in the contracts. It is obvious from the contracts that it was understood that the Canal Company was to divert water from the river, and it is obvious that the contracts by implication consented to such a diversion. The contract therefore was obviously a consent to such a diversion and operated as an estoppel against Miller & Lux to object thereto. It is quite probable that the reason that there was not a direct grant to the Canal Company of the right to divert a given quantity of water was, first, because at that time it could not be determined how much water the Canal Company would be able to beneficially apply, or how much the public would require, and, secondly, the success of the entire venture was probably one extremely problematical at that time. *Later, however, after the company had constructed its canals and their capacity and the demands of the public had become known, contracts were entered into, not only with Miller & Lux, but with the California Pastoral & Agricultural Company, fixing the amount of water which the Canal Company could divert, and granting it the right to divert the same.*

## VALUE OF WATER RIGHTS.

We would not have spent this amount of space in showing the amount actually paid by the Canal Company for its water rights if it were not for the fact that the master decided that if we had paid for our water rights we would be entitled to have a return thereon. This to our mind is the most conclusive evidence of the error of the master in holding as a matter of law that we are not entitled to a return upon the water rights. If anything is well settled in the law of rate fixing it is that the company is entitled to a return upon its property, irrespective of what it cost to acquire it, or whether it cost anything to acquire it. This principle has been nowhere more forcibly applied than it was by this court in the former case between the same parties in holding that the company was not entitled to a return even upon the amount of money necessarily and reasonably expended in the construction of its works, provided they were not of that value at the time the rate was fixed. In other words, the value of the thing which the company owns at the time the rate is fixed, and not the amount which it cost to acquire it, is the criterion. It was not necessary for us in this case to prove the *cost* of any of our property; all we had to prove was the ownership of the property and its present value, and if necessary the court would presume that we paid what it is worth at this time; but, as we have said, whether we did pay for it or whether we did not could not either increase or decrease the return that should be allowed us. In other words, if we had paid two millions of dollars for the water right, and it was only worth a million dollars, obviously the court would not allow us a return on the two millions. Conversely, if it were worth a million and we only paid a half a million there can be no reason under the law why we

should not be allowed a return on the actual value. We feel that the master's decision in holding that we would be entitled to a return on the water right if we paid for it, but would not be entitled to a return on it if we did not pay for it, is utterly indefensible under the law. Strange to say, while counsel for defendants withdrew all exceptions to the master's report, and have thus *from a legal standpoint* concurred in that part of the report that finds that we are entitled to a return on our water right if we paid for it, still counsel took the position in argument that we are not entitled to a return on the water right, whether we paid for it or not. *In other words, on the argument in the court below he expressly took the extreme position that if the company in pursuance of the authority granted by law to it had acquired these water rights by the process of eminent domain against the riparian owners, and had paid the value thereof as assessed by a jury, still when it sold that water and rates were fixed for the same it would not be entitled to any return whatever upon the money thus expended, or upon the right thus acquired.* On the contrary, we argue that we are entitled to a return on the water right by virtue of our ownership of it, and upon its present value irrespective of what we paid for it. We, therefore, proceed to the question as to the value of the right irrespective of any payment made therefor.

On this subject the master found that the water right is of the value of one million dollars, and the defendants withdrew their exception to that part of the report, the complainant has made no exception thereto, and it must therefore be deemed an admitted fact in the case. It is clear that that finding is a conservative estimate of the value of the right.

THE COURT ERRED IN ONLY ALLOWING EIGHT CENTS A CUBIC YARD FOR EARTHWORK IN 1907, WHEN IT WAS ADMITTED THAT IT WOULD COST ALMOST THAT AMOUNT IN 1896, WHEN THE COST OF LABOR AND MATERIAL WAS ONLY ONE-HALF AS HIGH.

THE COURT ERRED IN DISREGARDING THE REPRODUCTION COST IN 1907 AND SUBSTITUTING THEREFOR THE AVERAGE COST OF REPRODUCTION DURING A SERIES OF YEARS.

At the time of the fixing of the rates in the County of Stanislaus in 1896, the Board of Supervisors of that county employed R. H. Goodwin, civil engineer, to make a valuation of the company's property. His valuation at that time only covered a portion of the company's property and at the time of the establishment of the rates here in question, the company's plant had been very materially enlarged and extended. (See Exhibit 21, Trans. p. 1128.) The company, feeling that Mr. Goodwin if given proper opportunity could make a fair valuation of the property, employed him to make such valuation when the rates now involved were established. He made a very thorough examination of the property and his detailed report is set forth in complainant's exhibit "1," transcript pages 930 to 1071. His testimony in this case is found at transcript p. 723, and following. At the time of his valuation, made in 1896, he estimated the cost of excavation at 6.5 cents per cubic yard (Trans. p. 302). This did not include the cost of engineering and general superintendence (Trans. p. 304), which is agreed amounts to ten per cent additional. This would make his actual cost of excavation in 1896, 7.15 cents per cubic yard. He testified that this was rather a low valuation even in 1896, for in 1897 he entered into some contracts for excavation at 7 cents (Trans. p. 300), and the contractor



failed (Trans. p. 430). He testified, however, that during the years 1896-97-98 there was a general stagnation in business. The prices of labor and material were at the lowest ebb, labor was plentiful, and in fact there were many laborers out of employment, so that work at that time could be done at very low prices. This is a matter of which the court will almost take judicial notice. He further testified that in 1907 it would cost from 40 to 50 per cent more to do work of this kind than it would in 1896. This would make the cost in 1907 a little over 10 cents per cubic yard (Trans. pp. 289, 317, 294, 299, 316). He testified that the cost of labor in 1906 was double what it was in 1896 (p. 316). The other evidence on this subject was as follows: It appeared that the actual cost of the excavation in 1885 had been 15 cents per cubic yard (Trans. page 397).

C. A. Warren was also called as a witness on this subject. He had been in the contracting business since 1874, and was well acquainted with these canals. He testified that he considered the figures of Mr. Goodwin ridiculously low (Trans. p. 980). He also testified that during 1907 the average cost of labor was \$2.25 per day (p. 979), while in 1896 labor was plentiful at from \$1.00 to \$1.25 per day (Trans. p. 317).

W. C. Hammatt, civil engineer in the employment of the complainant, testified that he had done excavating for the complainant during the years 1907-1908 and that it had cost from 10 to 15 cents to do the work (Trans. p. 554).

To overcome this testimony, which was otherwise uncontradicted, the defendant called an engineer, H. H. Henderson. He testified that in his opinion, instead of constructing these canals with plows and scrapers, they could be constructed in a new method, as to which he testified as follows: First, he would construct two small canals, using an excavator; after these were com-

pleted he would turn water into them so as to float a dredger and this dredger would dredge out the "core" between the two small canals, thus completing the entire canal (Trans. p. 754). He testified that he had never used any such method of construction (Trans. p. 795), and that in order to do the work in this way it would be necessary to purchase a dredger costing \$20,000.00 (p. 796), and that all structures would have to be put into the canals before they were completed so that they could hold water to carry the dredger. He also testified that he figured that the dredger would do three-quarters of the work (Trans. p. 812). He testified that the dredger work would cost 5 cents per yard (p. 792), the excavator work from 6 to 7 cents (p. 793), and that the combination of the two would cost 5 cents (p. 793). (At these figures the cost would be in fact 6.12 cents.) On cross-examination this theory was entirely destroyed by showing that after the work had been done by the excavator the core left to be removed by the dredger would be so small as not to in any way justify such a method of construction. (See transcript pages 814 to 816, complainant's exhibit 30, and transcript page 922.) The witness then practically abandoned his claim that these canals could be constructed in any such a manner and further contended that he could make them with an excavator for 4 cents per yard (Trans. p. 856), although he had already testified that the excavator work would cost from 6 to 7 cents (Trans. p. 793). He also admitted that part of the work would have to be done with scrapers (Trans. p. 814).

The testimony of this witness being thus entirely destroyed, defendants shifted their ground from the theory of the construction with the combination of excavator and dredger to a construction with a combination of excavators and scrapers and in support of this theory called as a witness one A. B. Southard. He

first testified that you could run an excavator for from 3 to 5 cents per yard (Trans. p. 883). On cross-examination he testified that an excavator could not be handled in adobe soil (p. 883); that he had recently obtained a contract to do excavating which was offered to public bidding and for which he received 20 cents per yard (Trans. p. 885). He further testified that he had only used the excavator method on one job and that he had been compelled to abandon it and that the new contractor that took the job got 10 cents per yard for the work and that it actually cost him 9 cents per yard (Trans. p. 888). He further testified that the excavator cannot handle sandy earth (Trans. p. 890); that he had done work of excavation at San Diego and received 30 cents per yard (Trans. p. 892). He further testified that you could not complete any canal with an excavator because the excavator will not handle all the earth and the balance must be scraped out with a scraper (p. 893). *He further testified that canals constructed with excavator and scrapers were worthless and would not hold water against the banks for the reason that the earth is only dropped from the arm of the excavator and is not packed as it is when scrapers are used, and that the work that he referred to in his testimony did not in fact hold water* (Trans. p. 893). He further testified that in his estimate of the actual cost of running an excavator he did not include the work which had to be done with the scraper to complete the job and that the combined work of the scraper and dredger actually cost 7.5 cents and was worth from 9 to 10 cents (Trans. pp. 920-921). It will be seen from this that a canal constructed with excavators would be useless, as it would not be sufficiently packed to hold water against its banks, which is necessary in an irrigation canal (Trans. p. 916). Mr. Hammatt further testified that he had used an excavator and

that it actually cost 11 cents per yard (Trans. p. 917, and complainant's exhibit "32").

It seems to us that under this testimony it is not disputed that to construct these canals with plows and scrapers it would cost at least 10 cents a cubic yard. It is also well established by this testimony that a canal constructed with an excavator and scrapers is worthless and will not hold water even if it should be constructed more cheaply, and under these circumstances it seems to us unjustifiable to limit the cost of this excavation in 1907 to 8 cents a cubic yard, *including engineering and general superintendence*. The matter seems particularly unfair when the defendant itself placed a price of over 7 cents in 1896, and the testimony is undisputed that the cost in 1907 would be from 40 to 50 per cent greater than in 1896. In this connection the master practically disregarded the actual reconstruction cost in 1907, simply because the cost in that year was higher than the "average." We certainly feel that this is doing a great injustice to the complainant. It has been held in all of the cases that the present reconstruction cost is the measure of value, and in a former case between these same parties this court held the complainant down to the low value which existed at that time owing to the general stagnation of business throughout the country, and it is hardly fair to only give the company a return on a low value in bad years and then refuse it a return on a high valuation in good years. In fact, the master entirely repudiated the doctrine of reproduction cost so firmly established by this court and attempted to fix the value by speculating as to what someone might pay for the property and argued that a person purchasing the property would not consider the reproduction cost in an abnormally high year or an abnormally low year, but would figure on an average cost. If this rule were worked out logically in all cases and we were given

a return on an average cost during the life of the canal we might not object, as that would include the years when the work cost probably from 15 to 25 cents per yard, but we may properly insist that some consistent rule be applied, and if this court has not now adopted the rule of present cost of reproduction, then all the efforts of this court to lay down a rule on this subject have gone for naught.

The rule adopted by this court has been subject to criticism and the Supreme Court of California at one time adopted the rule of original cost on the theory that the company having then dedicated its property to the public was entitled to a return upon the value of the property when dedicated (*San Diego Water Company vs. San Diego*, 118 Cal. 556); but, while the reasoning of that case has considerable to commend it, it is not the reasoning adopted by this court, but, on the contrary, this court has firmly established the rule of present reproduction cost and has charged the complainant in this case with the loss resulting from that rule in years when values were low, and it would now be extremely unjust to deny it the benefit of an increased valuation when values are higher, especially in view of the fact that even in the latter years the values are much lower than the original cost. We believe that the decision of the master which was approved by the court below on this subject is contrary to the decisions of this court and should be reversed.

THE COURT ERRED IN HOLDING THAT, ALTHOUGH THE COMPANY WAS ENTITLED TO APPRECIATION IN THE EARTHWORK, AND THE UNCONTRADICTED TESTIMONY SHOWED SUCH APPRECIATION, IT COULD NOT BE ALLOWED BECAUSE THE WITNESS WHO TESTIFIED TO IT WAS NOT SHOWN TO HAVE BEEN SUFFICIENTLY QUALIFIED TO TESTIFY ON THE SUBJECT.

R. H. Goodwin testified as follows (Trans. pp. 278-9) :

“Q. 55. Along the canal bank, is there any roadway all the way from the head as far as Newman?”

A. Well, practically all the whole length of the canal.

Q. 56. The bank of the canal where the earth has been thrown out from the excavation that has been formed into a roadbed?

A. Either that or backed up the embankment, making it more solid and wider.

Q. 57. And what is the general condition of that roadway?

A. Very good indeed, when I was over it.

Q. 58. Do automobiles and horses and wagons travel it?

A. I didn't happen to see any, but they go along there.

Q. 59. You didn't see any automobiles?

A. I didn't see any automobiles.

Q. 60. But it is traveled by horses and wagons?

A. Yes sir.

Q. 61. You did not include anything extra in your estimate for that road?

A. No, I did not.

Q. 62. In regard to the canals, Mr. Goodwin, what is the difference between a canal when new and when old? Does it improve with age or decrease with age—that is, the excavation work itself; nothing else but the excavation work?

A. It improves with age.

Q. 63. And in what way?

A. It settles, becomes firmer. It stops seeping, which is a big item in irrigation work.

Q. 64. About the blowing out of the canal and structures, is there more or less likelihood of that in a new canal than in an old one?

A. Very much more in a new canal. The structures are not well seated.

Q. 65. In estimating the value of road work and excavation of these canals, did you simply put the valuation of the actual cost of excavating them, or did you add anything for the appreciation that you have mentioned?

A. No, I did not add the appreciation; just the mere cost of the excavation.

Q. 66. That is, you took no note of any appreciation, if there was any, in making your estimate?

A. No sir."

W. C. Hammett testified to his qualifications as a civil engineer (Trans. pp. 538, 539), and, after testifying as to his familiarity with the canals of complainant, testified as follows (Trans. pp. 543-4, 548-51):

"Q. 48. Will you state to the court, Mr. Hammett, how a new canal, newly built, differs in its effectiveness from an old canal, so far as the earthwork is concerned, irrespective of the structures?

A. Yes sir. Well, for the first few years, the number of years depending a good deal on the character of the soil through which the canal runs, there is not only a great deal of seepage from the canal, due to the loose soil, but there is also quite a bit of danger connected with operating the canal, due to the banks not being compacted, and water getting out through small crevices between the clods in the banks and starting a stream out which will make a washout; also from the structures not being compacted and well bonded around the footwalls, and "blowing

out," as it is called, which makes a new canal rather precarious of operation. After it has been operated a few years, depending, as I say, on the nature of the soil, things get in a condition so that it stays about the same from year to year. The apertures between the clods get filled with silt, and the same way the footwalls and the floor settle and get well silted around, so that it stops the leakage from the canal, stops both seepage and leakage from the gates, which tends to blow out the gates.

Q. 49. Have you given attention to the amount of loss from seepage and evaporation in canals?

A. I have, in a general way, but I have been unable to get accurate figures on them. Figures are very hard to get, due to people wanting to get water through and not caring much about the measurements.

Q. 50. But have you experimented yourself in order to determine the amount of loss by seepage and evaporation in canals, new and old, and otherwise?

A. I have with old canals; but, as I say, on new canals I have been unable to get figures except in a general way, because we have no new canals of our own, and with other people's canals, they do not seem to care much about the figures, and so it is impossible to get accurate figures from them. They do, however, state that the loss is in a general way, so much, but there is nothing accurate in those figures.

Q. 51. Well, irrespective of the exact figures, are you able to approximate the difference in loss between a new canal and a well silted canal, *from the experience you have had?*

A. I am able to assume it at a quantity which I am sure is less than the actual quantity. That is the best I can do.



Q. 52. That is, to a certain degree you would be able to give what would inevitably be the leakage and seepage in this canal if it were built and completed today and put into immediate operation?

A. That is what I meant to state, yes.

Q. 53. It might be greater than you estimate; but you mean that you can give an estimate which you are sure of?

A. Which I am sure would be the minimum quantity.

Q. 54. What examination, if any, have you made of the canals of complainant in order to determine the amount of actual seepage and evaporation in the complainant's system of canals as they now exist and of during the year 1907-8?

A. In August, 1907, I had measurements taken over the whole San Joaquin system and determined the amount of loss of water during a short period during that month, a period of seven days, in fact, was all that I was able to collect proper figures on, due to the inexperience of the men that I had at work on it. So I had to throw out the first two weeks of their work, and the third week they got in figures which could be taken. Then in 1908 I had continuous measurements taken from the 1st of July until the last of August, to determine the exact amount of loss from seepage and evaporation in the canal.

Q. 57. Now, will you state the results of your measurements in 1908, the whole result, as much in detail as you think necessary?

A. I have not much detail here. The total loss in second feet per day was 437.26.

Q. 95. Now, you stated that your experience permitted you to come to at least a minimum amount that would be lost in a new canal, and for the first few years of its construction. Will

you state what that experience has been in that regard, and what is the amount of loss in a new canal as compared with this canal?

A. *My knowledge of that is mainly from observation of a few small, new ditches, and of hearsay in regard to actual canals where water has run in on new canals. For instance, we have at the end of our outside canal a Realty Ditch, which was put in during the past year, and we know how much water per acre it took in that ditch to irrigate. We know that that was about six or eight times the amount that it takes per acre to irrigate under our own canal. Therefore, we assume that the extra quantity of water was lost in the canal due to its being a new canal. It would be probably about five times the amount that is being lost per mile in our own canal. Then I have been told by people who were connected with the canal system—the San Joaquin canal system—that at the time when the extension of the canal was made from Los Banos creek to Orestimba creek, that between four and five hundred second feet were turned into that canal first, in attempting to take it to the Orestimba creek, and that very little of that water reached Orestimba creek; that is, that the loss for that—about 30 miles—was about 400 second feet for 30 miles.*

Q. 96. *I would suggest that it is better to base your testimony on your general knowledge as to the character of the soils and the way that water does act in new canals, according to your knowledge, and compare it with how it acts in this particular canal, rather than on individual matters of that kind which you have no personal knowledge of. It is a matter of opinion, you understand, on this matter. It is not a matter of knowledge, that anybody can testify to.*

A. I was merely giving the general characteristics. It is well known, not only among en-

gineers, but also among laymen, that when water is turned on new ground, whether that ground has been shaped in the type of a ditch or whether it is cultivated ground, that the water seeps into the ground and seeps away, depending on whether the ground is silted or not—on the character of the soil, whether it is loose ground—a close-grained soil. I merely wanted to show that two or three times the quantity of water which is now being lost in the canal is a very light estimate of what would be lost in a new canal. My idea is that in the average ground, consisting of a loam, that there would be from three to five times the amount of water lost the first year than there would after the canal is thoroughly silted, and that this silting process would take a number of years, the canal growing nearer and nearer the perfect condition as the years went on.

Q. 97. Take this entire canal system, what would be your opinion as to the amount that it would lose on the average during the years before it got into what you might call a perfect condition?

Mr. Langhorne: I object to that on the ground that the witness's own testimony shows that his knowledge as to new canals depends on hearsay, and that he has no knowledge of this canal prior to 1907; and on the further ground that it is irrelevant to any issue in this case, what the loss would be in this canal as a new canal.

The Master: The objection is overruled.

Mr. Langhorne: We take an exception.

A. I should say that it would lose three times as much at the start as it would after, eight years or so, and that after eight years or so it would practically be silted so that the loss would be very little more than it would after any succeeding number of years.

Q. 98. Did you make an estimate of the increased value of the canals over new canals by reason of the greater quantity of loss in the new canal than the old canal?

A. I did.

Q. 99. Will you state now exactly what you based that computation on—that is, what proportion of loss in a new canal, and what number of years you assumed it would take to get the canal into normal condition, and what the percentage of loss you assumed in the canals in their present condition?

Mr. Langhorne: It will be assumed that my objection and exception to all this class of testimony, as to loss from seepage and evaporation in this canal as compared with a new canal, or as to any testimony as to increased valuation of complainant's canal system by reason of those facts, in regard to loss by evaporation—that my objections and exceptions to all that class of testimony apply?

The Master: It will be so considered.

A. The theory that I went on was this: that if the canal was constructed anew, that there would be a very much increased quantity of water lost in that canal in the first few years, as I have stated. The canal is entitled to a certain quantity of water. We have takers for all that water; and, therefore, the second feet lost during this few years while the canal was silting up, is an actual loss in dollars and cents. I consider that loss as a block amount equal—that is, that the loss in one year, the present loss in one year, that is, the increased loss because of the canal being new, over this eight years, would be equal to six (6) times the present loss in one year. This is due to the fact that at first, the first year, it would be three times as much, but the second

year it would be very much smaller; that is, the change in loss for that eight years would not run in a straight line, but would run in a curve approaching the horizontal; that at the end of eight years the loss would be the same from year to year and that the total loss of those eight years would amount to, as I say, a block amount equal to six times the present amount in one year. That amount would be approximately 125,000 second feet for 24 hours. I gave this a value equal to the value per second foot of every second foot which we sold during the past season, 1907-8. This average amount received for every second foot that we sold was \$1.05 per second foot for 24 hours, which made the value of this 125,000 second feet of excess loss due to a new canal to be worth \$125,250.

Q. 100. In figuring the difference in value between an old and a new canal, in the figures that you have given did you take into consideration the fact that in the new canal the structures would, as you say, be more apt to blow than in the old canal?

A. I didn't consider that question at all, although it is a very vital question. It is one that we cannot actually reduce to dollars and cents.

Q. 101. And the fact that in a new canal the banks are more likely to be washed out and break and do damage—you didn't include that?

A. I didn't include that. That would be a matter of possibilities and probabilities that would be a little too complicated to reduce to figures.

Q. 102. It would be impossible, of course, to state it in figures, exactly what it would be?

A. Yes.

Q. 103. But is it or is it not the fact that that is the tendency?

A. It is a very well known fact.

Q. 104. And there is also a road all along the bank of this canal, is there not?

A. There is.

Q. 105. And you have not included in your estimate any increased value for that owing to traveling over it until it is all worn down, as over a new-thrown-up bank?

A. No, I considered no appreciation from those causes. The only appreciation I considered was the actual appreciation from the loss of the water itself, the actual loss that would take place in a new canal, due to seepage and evaporation alone."

At the next session Mr. Hammatt further testified on cross-examination as follows (Trans. pp. 580-1):

"XQ. 252. In regard to Exhibit 26, Mr. Hammatt, on the first page you have a column headed 'Appreciation of earthwork.' Take for instance the first item of that appreciation account, namely, 'Main Canal, \$18,700.' Will you please state how you arrived at those figures of appreciation?

A. I arrived at the total appreciation of the canal system according to the method which I stated at the last session. And these separate ones for the different canals shown in the third column on the first page mentioned are the proportional amounts according to the amount of earthwork in each canal system.

XQ. 253. Will you please state how you arrived at the appreciation of the total earthwork of the canal.

A. I think I already gave that in detail at the other session, but I will go over it again.

XQ. 254. I mean the principle upon which you proceeded?

A. I considered that a new canal of the exact nature and size and dimensions of the canal system which we are speaking of would, during its first year, lose several times the amount of water

which the canal would after it had been in use a number of years; in fact, that it is now losing; and I took an arbitrary amount for the amount which it would lose, which I am positive, myself, and which I think that any engineer or layman who is familiar with new canals will see is less than the absolute amount which would be lost by a new canal of the same kind.

XQ. 255. What was that amount, that basic figure of loss by a new canal, that you took?

A. I considered that it would lose the first year three times the amount that a properly silted canal would lose, and that this amount would gradually approach the regular amount of seepage and evaporation which an old canal would have, arriving at that amount in, say, eight years; and that the total amount of loss due to a new canal could be represented as six times the amount which our present canal loses in one year; that that would be considered as the total amount which would be lost in those eight years in which the loss was going from three times the present amount, until it was arriving at the present amount.

XQ. 256. Then you took that loss and capitalized it?

A. Then I took that loss and capitalized it; that is to say, I considered that each and every second foot of that water would irrigate a certain amount of land, and that since we had a demand for all our water that the loss of that water was actually a loss of money, and that this money—that every second foot of that had a value equal to what we got for every second foot of that delivery during the year 1907-8, and that that amount was \$1.05 per second foot.”

On cross-examination counsel, after showing that the witness had never had occasion to estimate a loss by seepage and evaporation under conditions of climate

and soil existing under complainant's canal prior to going into the employ of the company, asked the following questions (Trans. pp. 581-2) :

"XQ. 261. Now then, according to your theory of appreciation, you have allowed a certain amount on that, although nothing had been expended by the canal company on that account? Is that so?

A. Nothing has been expended on it.

XQ. 262. In other words, if one of the wooden bridges across the canal, long since its construction, had become petrified and had become a stone bridge, you think you also would be justified on the theory that you have advanced, do you not, of now valuing that bridge more as a stone bridge than as a wooden bridge? Is that it?

A. If anything so absurd had happened as a wooden bridge becoming a stone bridge, I certainly think it would have a greater value than it had when constructed as a wooden bridge.

XQ. 263. Although the canal company had made no investment at all on that bridge as a stone bridge?

A. That is the theory.

Mr. Treadwell: Do you deny the correctness of that theory, Mr. Langhorne?

Mr. Langhorne: I do. I would say it was absurd."

*The defendant introduced no evidence whatever to contradict the testimony of Mr. Hammatt that there would be this loss of water in a new canal, thus making it less valuable than an old one, but on the contrary the defendants' testimony practically conceded the truth of this testimony, and when their engineer, H. H. Henderson, was on the stand they asked him no questions for the purpose of contradicting the fact that there would be such loss and that the canals would for that reason be less valuable, but they con-*



tented themselves with asking the following questions (Trans. pp. 756-7) :

"Q. 57. Now, Mr. Henderson, there is, I suppose, in this canal a certain loss by seepage, is there not, of water?

A. Yes sir.

Q. 58. I ask you whether, in your opinion, any sum of money should be added to the value of these canals on account of or as representing in any way the loss of any water by seepage?

Mr. Treadwell: We object on the ground that the question calls for a conclusion of the witness.

The Master: I overrule the objection.

A. If the valuation of the canal should be increased in regard to its cost or in regard to the value by the silting up of the canal to the extent of preventing further percolation, I should not think so, inasmuch as in the design of the canal it is one of the elements necessary to have the canal sufficient to allow for seepage and evaporation in order to irrigate a certain area; and in the construction of the canal to irrigate a given number of acres due consideration is given to that part of it; and, therefore, it follows that the original cost of the canal covered the feature of seepage, *and that afterwards if the seepage is reduced, it would simply give a greater earning capacity of the canal on the same investment.*"

This is all of the testimony on this subject. The master held, and we think correctly, that the answer of Mr. Henderson as above given necessarily showed that such appreciation should be considered in fixing value and rates, for, if a given canal has a "greater earning capacity" by reason of its age, it necessarily is more valuable, and the value of the canal and not the amount invested in it is the test in rate fixing cases. The fact that it has a "greater earning capacity"

necessarily shows it has an earning value upon which the complainant was entitled to a return. But, much to our surprise, the master held that the fact that such a canal would have a greater earning capacity for the reason that it would not lose so much water had not been proved, for the reason that the witness Hammatt, who testified thereto, was not sufficiently competent to testify on the subject, and therefore refused to consider any additional value growing out of this fact. It should be remembered that the evidence in this case was taken before the standing master as a referee by stipulation of the parties (Trans. p. 55 to 56). Under such a reference it is well settled that the referee has power to rule upon the admissibility of testimony. Most of the testimony of Mr. Hammatt on the subject was admitted without any objection whatever, and when the defendant did object to the testimony the master overruled the objection and permitted the witness to answer (see Trans. pp. 549 to 550). The court itself without any testimony would take judicial notice of the fact that a **new canal** would seep and lose water more than would an old one and the court would also assume that a person who had been educated as an engineer and had followed that for 15 years (Trans. p. 539), and who had been particularly engaged in canal work for at least a year before he gave his testimony, would be able to estimate in a general way the amount of such seepage. While he did testify that he could not give "exact figures" as to loss in a new canal owing to the fact that he had never made any measurements, he did testify without objection as follows:

"Q. 51. Well, irrespective of the exact figures, are you able to approximate the difference in loss between a new canal and a well-silted canal, from the experience you have had?

A. I am able to assume it at a quantity which I am sure is less than the actual quantity. That is the best I can do.

Q. 52. That is, to a certain degree you would be able to give what would inevitably be the leakage and seepage in this canal if it were built and completed today and put into immediate operation?

A. That is what I meant to state, yes.

Q. 53. It might be greater than your estimate; but you mean that you can give an estimate which you are sure of?

A. Which I am sure would be the minimum quantity.

These questions and answers qualified him as an expert to give his opinion. The defendants if they desired might have cross-examined him for the purpose of showing that he did not have enough information to give any opinion, but they did not cross-examine him and the objection which they did make was properly overruled by the master. Under these circumstances we earnestly contend that it is improper to permit the defendants now to contend that the witness was not qualified to give an opinion on this subject, especially in view of the fact that the court will take judicial notice that there would be some additional loss and the defendant's own witness practically admitted the loss and simply attempted to give a legal opinion that such loss did not affect the income which should be allowed. The master having held that if this increased value was shown by competent testimony we would be entitled thereto and the defendants having withdrawn their exceptions to the master's report, it will be unnecessary for us to argue the correctness of that ruling.

In a further attempt to justify the disallowance of any value due to appreciation, the master fell into a

peculiar error. He figured that during the seven years that the canal was reaching its highest efficiency there would be a large amount of silt deposited in the canal which he estimated might cost as much as ninety thousand dollars to remove. He then reasoned that this would not have to be removed, and the company would save the expense of removing the same, and therefore for some reason that should be set off against the increased value of the canal. Of course, when the witnesses refer to the fact that a canal by use will settle and that the "apertures between the clods" would fill with silt, and that the floor would settle and get well silted around so as to stop leaks, they did not mean that during that period they would permit the canal itself to silt up to an amount equivalent to one-fourth of the cost of excavating the canals. If the master's supposition is correct that the canals would have silt deposited in them to the extent mentioned, it would result that the cross-section of the canal would be reduced about one-fourth. Obviously this would have to be removed by the company at some time, and it has been removed because there is no silt in the canals (Goodwin, Trans. p. 315). It is also clear that the cost of removing the silt would be a cost of maintenance which would have to be paid, and presumably was paid out of the income of the company, and unless it was removed the canals would be depreciated in capacity, and therefore in value. In reaching his conclusion the master entirely failed to grasp the distinction between the floor of the canal being silted by having the fine material carried in the water deposited in the crevices of the coarser earth in which the canal was excavated and the deposit of silt in the canal itself so as in a certain extent to destroy the canal. All the evidence shows that this is a process which the canal company must guard against and the record shows a large amount of money an-

nually expended in cleaning the canal to get rid of the silt thus deposited. It therefore very clearly results that the company could not permit that class of silting to go on, but on the contrary that it must and has maintained the original cross-section of the canal. In fact, the defendants' own witness, Henderson, showed that the present size of the canal exceeded what he deemed to be the original excavation thereof (See Transcript p. 782). But the company would not make anything by the fact that it did not need to clean its canals the first few years, for that is a cost of maintenance and if not expended presumably the rates were reduced accordingly. The assumption, therefore, that the company profited thereby to that extent in the seventies cannot affect the actual value of the canals in 1907.

**THE COURT ERRED IN MAKING A HORIZONTAL CUT IN THE VALUE OF THE STRUCTURES IN 1907 ON THE GROUND THAT SOME OF THEM HAD BEEN CONSTRUCTED MORE CHEAPLY IN THE YEARS 1896 TO 1898.**

The master accepted the complainant's detail of the structures in the canal as prepared by Goodwin, but made a horizontal cut of twenty-five per cent in his estimate of the cost of reconstruction thereof. In doing so, the master based his decision on the fact that between 1896 and 1898 the complainant had constructed its Outside canal for considerably less than Goodwin's estimate of the present cost of reproduction. In reaching this conclusion, the master in the first place fell into a serious error of fact. The master assumed that the evidence showed that the actual cost of the Outside canal was \$86,315.56, whereas Goodwin's estimate of its present value was \$168,840.42. (See Trans. p. 71.) In this the master is clearly in

error. The evidence showed that the Outside canal was constructed in two sections, the first section running as far as Los Banos creek, and the second section running from that point to the present end of the canal at Quinto creek. The cost of the canal to *Los Banos creek* was \$86,315.56 (Trans. p. 359), but the total cost of the entire outside canal was \$149,960.77 (Trans. p. 359), and this did not include the cost of surveying, general superintendence or salaries of administrative officers (Trans. p. 371). Adding ten per cent (10%) to cover these items, would make the actual cost of the Outside canal, constructed between 1896 and 1898, \$164,956.81. This is substantially the reproduction cost of it as estimated by Goodwin in 1907, his figures being \$168,850.42 (see Trans. pp. 969 and 1042). The error into which the master fell was caused by the fact that he was comparing the present value of the entire Outside canal as estimated by Goodwin with the actual cost of the portion of the Outside canal to Los Banos creek, and basing his decision on this error he makes a horizontal cut in the present value of all of the complainant's structures. He also justified this cut by reason of the fact that the weir or dam across the river, built in 1898, actually cost less than the estimate of the cost of reproduction in 1907. The evidence shows that the weir actually cost \$28,988.28, to which should be added ten per cent (10%) for engineering and general superintendence, making \$31,887.11. The estimate of Goodwin as to its reproduction cost in 1907 was \$54,046.50. While at first blush this would seem to be a considerable increase, as a matter of fact, in view of the increase in the price of labor and materials, no other result could be expected. In 1896 lumber in place cost about thirty (30) dollars a thousand (Trans.

p. 1216); in 1907 it cost about forty-seven dollars and fifty cents (\$47.50) a thousand (Trans. pp. 553-4). In 1898 carpenter work was worth five (5) dollars a thousand (Trans. p. 1221), and in 1907 ten (10) dollars a thousand (Trans. p. 931). In 1898 redwood lumber was worth thirteen (13) dollars a thousand (Trans. p. 1217); in 1907, twenty-seven (27) dollars a thousand (Trans. p. 931). In 1898 piles were worth thirteen (13) cents a running foot (Trans. p. 1217); in 1907, twenty-five cents (25c) a running foot (Trans. p. 931). In 1898 freight and hauling to Mendota was worth eight (8) dollars (Trans. p. 1218); in 1907, ten (10) dollars (Trans. p. 931). As we have already seen, the cost of labor in 1907 was double the cost in 1898 (Trans. p. 316). In 1898 labor could be had from one dollar to one dollar and twenty-five cents a day (Trans. p. 317); in 1907 it cost two and a quarter a day (Trans. p. 979).

But in fact the master does not seriously dispute that the reproduction cost in 1907 will be the amount estimated, but he entirely repudiates the present reproduction cost. In this regard he says:

"It seems to me that it does not necessarily follow that present cost of reproduction would always be present value. In a work of the magnitude and durability of the properties under consideration, the values thereof would not be materially affected by fluctuations of prices. In the course of a number of years the value of the plant might vary, but its value would not vary from year to year with the fluctuation of prices. In other words, if we assume a year of great financial depression, when the prices of labor and materials have become greatly lessened, caused by the some great calamity or abnormal condition which was clearly of a temporary nature, it could not be said that the values of complainant's properties had fallen

to the extent of such temporary decrease of labor and materials. For rates to be fixed on such a basis would certainly be most unjust and unfair to the canal company. On the other hand, if because of some reasons, such as actually took place immediately preceding the time that Mr. Goodwin's estimates were made, caused by the earthquake and fire of April, 1906, in San Francisco, the local prices of all commodities and labor was abnormally advanced, certainly an estimate based upon such prices and rates fixed thereon would be unjust to the consumer. So I conclude that 'present value' does not necessarily mean present cost of reconstruction. Although no testimony has been offered in this case tending to show to what extent prices were abnormal, in the fall of 1906, in this market at the time that Mr. Goodwin made his estimates, it is a matter of common knowledge that both labor and materials were unusually high." (Trans. pp. 76-77.)

It would seem from this that the Canal Company gets the worst of it both in years of depression and years of prosperity. In the years of depression when the rates were fixed in 1896 the property was valued for what it would then cost to reconstruct it, and then as prices gradually increased until the year 1907, we are told that we are not entitled to the benefit of such increase. It sounds very well for the master to say that it was unjust to have held us down in 1896 to the then low value during those years of financial depression, but the fact remains that we were held down, and, as we understand the decisions of this court, properly held down to the then reproduction cost of the property.

We submit that if this matter is to be judged by matters of common knowledge rather than by testimony, that the values of 1907 were more normal than



were the low values in 1896 and 1898. At any rate, during those years, values were lower than they had ever been or have since been since the Civil War, and how the values can be said to be abnormal in 1907 or normal in 1896 is difficult to understand. There is absolutely no evidence in the record that the earthquake and fire in San Francisco had any material effect on values or cost. However, we do not deem it very material to consider what is the cause of the cost of reproduction, as that might be due to a variety of things, but we simply submit that this has been held to be the proper basis of value, and it is not fair to apply that rule against the company and refuse to apply it in its favor.

We therefore believe that the lower court proceeded on an entirely improper basis in fixing the value of complainant's property, and that the case should be sent back to that court to make a valuation upon the proper basis. Under these circumstances it would hardly seem necessary to burden the court with the details of the testimony as to the present value of the property. However, we will briefly call attention to certain matters of importance.

The detailed estimate of the structures in complainant's canals was furnished by witness Goodwin, and is set forth in complainant's exhibit 1 at page 930, et seq. The court will note that this estimate was made by the same engineer who had been employed by the county in 1896, and the court will see the great care and detail with which this estimate is made. It begins with the structures at the head of the canal and follows down each canal, so that every structure can be located, the exact character and quantity of lumber and material therein, and the exact price of which the same is estimated is noted, so that there is little left in the way of estimate or supposition, and the master very properly said in regard to this report:

"I am of opinion that the report of Mr. Goodwin was the more carefully made, that his experience as to the properties of this company was greater than that of Mr. Henderson." (Trans. p. 77.)

His valuations are also confirmed by the witness Hammatt (Trans. pp. 540-541).

The defendants called two witnesses on this subject, but it is obvious that neither of them can be relied upon to assist the court in arriving at the value of the property. The first one, Charles E. Sloan, only examined a portion of the canals, and his estimate does not cover the Outside canal at all. (Trans. p. 697). He had never built a ditch larger than twenty to twenty-five feet and half a mile long (p. 700). He was only a week or ten days on the canal altogether (Trans. p. 703), and the canal was full of water (Trans. p. 705), and part of the country overflowed (Trans. p. 706). He had never hired any men and therefore knew nothing about the cost of labor (Trans. p. 707), could not explain the meaning of his own report, nor nor had he bought any materials (Trans. p. 707). He could he tell where any structure therein contained was situated (Trans. p. 708). His report did not include the five outlet canals (Trans. p. 709). He took the word of a man named Smith as to the personal property (Trans. p. 710). He did not examine the telephone system (Trans. p. 710). He had never operated a canal (Trans. p. 711), and did not know what a zanjero was (Trans. p. 712). He had never irrigated land (Trans. p. 713). He testified that he could not locate any of the structures contained in his report (Trans. p. 714). He testified that there was nothing in his report showing the value of any particular structure (Trans. p. 717). The report did not include the value of the right of way (Trans. p. 719),

or the interest on money spent in construction (Trans. p. 714). The only way he measured the cross-section of the canal was to stick a lath into the water (Trans. p. 718). It is not disputed that such a measurement is useless (Trans. p. 923), and it is admitted that no one could locate any of the structures contained in Sloan's report (Trans. p. 923). •

It seems unfortunate that such evidence should be produced where the company had furnished the defendants with the most careful detail of its property, and this particular witness had that detailed report with him in making this examination, and still instead of checking that report and making one along the same lines, he brings in a report which no one can either understand, verify or check. However, as the defendants have never apparently placed any weight on this young man's testimony, we will pass it by without further comment.

The only other witness as to the value of structures was H. H. Henderson, and his examination likewise was made hurriedly during the trial, and did not cover anything like all of the system. His report did not include Dos Palos Canal No. 1, valued by Goodwin at \$6,453.42; Dos Palos canal No. 2, valued by Goodwin at \$13,265.23; Dos Palos canal No. 3, valued by Goodwin at \$14,977.83; Dos Palos canal No. 4, valued by Goodwin at \$9,321.54, and Orestimba Branch canal valued by Goodwin at \$3,321, making a total of \$47,339.02 (Trans. pp. 750-1). The report did not include the telephone system (Trans. p. 759), or the right of way of the company (Trans. p. 759). This report did not include any land (Trans. p. 799), or any interest during construction or any money necessary to be kept on hand to run the business (Trans. p. 799); nor did it include any value of any fences along the canal or the value of the roads along the

same (Trans. p. 800). It omitted the gates in Spillway No. 1, and the gates in Spillway No. 2, (Trans. p. 800). One place he admitted that 8,268 cubic yards should have been 82,680 cubic yards (Trans. p. 781). He allowed a flat amount of twenty-five (25) dollars a thousand for lumber, whereas the report of Mr. Goodwin shows each kind of lumber separately stated, and varying from twenty-seven, thirty and fifty dollars a thousand. (See Trans. p. 931). He admitted that lumber which he had bought had cost twenty-six to twenty-eight dollars a thousand (Trans. pp. 801-2). His account allowed no freight whatever although the item of freight on the headworks alone would exceed five thousand (5,000) dollars (Trans. pp. 802-931). He only allowed a flat figure for hauling, whereas Goodwin carefully estimated the price for hauling from each particular point (Trans. p. 802). The character of his work can be seen from the fact that he figured that the moment a structure was constructed it was immediately depreciated ten (10) per cent (Trans. p. 804). The absolute unreliability, however, of his estimates became obvious when his report on particular structures was compared with actual facts:

1. The headgate found in his report at station 0-30 (Trans. p. 1359) he estimated to cost \$810 and that on the first of July, 1907, it had already depreciated ten per cent (10%). As a matter of fact it was not constructed until November, 1907 (Exhibit 33, p. 1710), and it actually cost \$2,585.29, and this did not include any profit or any charge for general superintendence, but simply included the actual labor and materials (Trans. p. 918).

2. Weir, station 579-88 (Trans. p. 1364) he testified cost \$601.50, and that on the first of July, 1907, it had depreciated eighty per cent (80%). As a matter of fact it was built in February, 1908, and was built

upon an old sub-structure, the superstructure alone costing \$870.67 (Trans. p. 1210).

3. Weir at station 334-53 he testified cost \$810.10, and that on the first of July, 1907, it had depreciated 20% (Trans. p. 1362). As a matter of fact it was not constructed until October, 1907, and had actually cost \$2,444.55 (Trans. p. 1210).

4. Weir at station 3570-93 (Crow Creek weir), he testified cost \$594.30, and that on the first of July, 1907, it had depreciated twenty per cent (20%). As a matter of fact it was not constructed until August, 1907, and it actually cost \$1,039.58.

5. Bridge, station 0-42, he testified cost \$390.50, and that on the first of July, 1907, it had depreciated twenty per cent (20%) (Trans. p. 1374). As a matter of fact it was not constructed until December, 1907 (Trans. p. 1210).

6. Bridge, station 252-73, he testified would cost \$452.80, and that it had depreciated ten per cent (10%) on July first, 1907 (Trans. p. 1361). As a matter of fact it was not built until June, 1908, and actually cost \$593.56.

(See generally as to these structures, transcript pages 917-919 and complainant's exhibit 33, page 1210).

These figures of actual cost did not include any profit of contractor or any general superintendence (Trans. p. 929).

It necessarily results from these considerations that the only reliable testimony as to the cost of the structures is the testimony of Mr. Goodwin. It should also be observed that the actual cost of lumber in all the structures that were constructed in 1907-8 was \$29.05, a thousand (Trans. p. 1210), whereas Henderson only allows a flat rate of \$25.

It should also be noted that although the defendants had the detail of our structures as prepared by Mr.

Goodwin, they deliberately got up Mr. Henderson's report so that it is impossible to compare any structure. In other words, it is impossible to determine from the report what structures in it correspond with the structures in Mr. Goodwin's report.

**THE COURT ERRED IN REFUSING TO INCLUDE IN THE  
VALUE OF THE RIGHTS OF WAY THE COST OF  
FENCING THE SAME.**

It appears that a portion of the complainant's canal has been fenced by the adjoining property owners, and it also appears that a portion of it is unfenced and was acquired by the company without being compelled to fence the same. It is clear that if the company or any other company proceeded to get this right of way it would be compelled to pay the land owners the expense of fencing the same, and this expense would be in addition to the value of the land itself.

*Butte Co. vs. Boydson*, 64 Cal. 110;  
*Sac. Valley R. Co. vs. Moffitt*, 6 Cal. 746.

It would cost \$42,471 to fence the canal rights of way (Trans. p. 599). It does not appear to us that it is material whether the company actually paid that amount when it acquired the right of way. The value of the right of way being what it would now cost to acquire it, is necessarily the cost of the land plus the cost of fencing the same, and this cost should therefore be added to the value of the land. This the court refused to do, on the ground that we had not fenced it. We had never claimed that we fenced it, but on the contrary claimed that we owned the right of way without any liability to fence it, and whether this is because we paid the land owners or were enterprising enough to get the land without paying for it is an immaterial factor in the case, since the law deals only

with the value of our property and not what it cost to acquire it.

The court therefore erred in refusing to allow this amount in fixing the value of the right of way.

**THE COURT ERRED IN CHARGING THE COMPANY WITH THE RECEIPT OF THE FULL RATE FOR WATER FURNISHED TO MILLER & LUX UNDER SPECIAL CONTRACTS MADE IN CONSIDERATION OF THE GRANT OF IMPORTANT WATER RIGHTS, WHILE AT THE SAME TIME REFUSING THE COMPANY ANY RETURN UPON THE WATER RIGHTS THUS ACQUIRED.**

Of course it is elementary that ordinarily if a canal company enters into a contract to supply water at less than the rate fixed by the public authorities, in determining the validity of the rate fixed the contract must be disregarded and the company deemed to have received the full rate established by law (*Boise City L. & L. Co. vs. Clark*, 131 Fed. 414); but if such contracts are entered into in consideration of the grant of valuable rights it would be extremely unfair to both charge the Canal Company with the receipt of the rate which it could not collect under the contract and at the same time refuse it any return upon the water rights acquired in consideration of the contract. In other words, if Miller & Lux had granted water rights to the Canal Company and the Canal Company had paid them a lump sum therefor, we would not deem any further extended argument necessary to establish that the company should receive a fair return on the money thus expended, or on the value of the property acquired therefor. Again, if the company acquired valuable water rights from Miller & Lux and in consideration thereof agreed to pay Miller & Lux an annual sum therefor by way of rental or installment, it would seem to be equally clear that the company would be

entitled to either a return on the property acquired or credited with the annual payments made. If this be true, the situation does not seem to be materially changed by the fact that instead of paying a lump sum for the rights or instead of paying an annual sum therefor, the Canal Company gave Miller & Lux certain concessions in the way of water rates and certain concessions in the use of water without charge. In such case, the company should also be entitled to a fair return on the water rights acquired, and if it receives that fair return it has no complaint to make even if it is charged with the receipt of the full rates for the water furnished in consideration thereof, but it does claim that it is highly unjust to charge the company with the receipt of amounts which it has not received and could not receive under its contracts with Miller & Lux, and still give it no return for the valuable water rights acquired from Miller & Lux.

#### CONTRACTS WITH MILLER & LUX.

We have set forth in the fore part of this brief at some length the substance of the contracts between Miller & Lux and the Canal Company. The first contract (complainant's exhibit 6; Trans. p. 1074) was entered into between Miller & Lux and the predecessor of complainant on May 18th, 1871, at a time when Miller & Lux had no control whatever over the Canal Company. (Trans. p. 345). It appears that Miller & Lux owned a large amount of riparian lands along the San Joaquin river and was therefore in a position to either permit or prevent the carrying out of this enterprise (Trans. p. 343). By that agreement, the Canal Company agreed to construct the canal so as to irrigate a certain amount of land. Miller & Lux granted them a right of way over their land; also permitted them to use all sloughs on their land, and also agreed to pay



a subsidy of twenty thousand dollars in cash. The Canal Company agreed to furnish the water and to furnish it for a price not exceeding one dollar and twenty-five cents (\$1.25) per acre. It was further agreed that should the said canal diminish the natural overflow which usually occurs between the first day of April and the 15th day of June of the San Joaquin river and its sloughs upon said lands of Miller & Lux, that the Canal Company should between those months open the gates of its canal at the request of Miller & Lux, and, free of charge and expense to them, permit an overflow from the canal on their lands equal in quantity to that of which they were deprived (Trans. p. 1075-6).

The Canal Company further agreed to furnish proper bridges across the canal and also permitted the use of stock water free of charge.

This was followed by a subsequent agreement (Exhibit 7, Trans. p. 1077), dated February 7th, 1872, containing substantially the same provisions. This was also entered into at a time when Miller & Lux had no control over the Canal Company (Trans. p. 343).

It will be noticed that these contracts did not expressly provide how much water might be diverted by the Canal Company, but the capacity of the canal was about eight hundred (800) cubic feet, and on May 18th, 1899, Miller & Lux Incorporated entered into a further contract confirming that amount of water to the Canal Company (Complainant's Exhibit 10, trans. p. 1086). About that time the Canal Company desired to take out a new canal known as the Outside Canal, with a capacity of about three hundred and fifty (350) cubic feet, and Miller & Lux likewise granted them the right to divert this quantity of water (Complainant's Exhibit "10," pages 1086-7). It will also be noted that the early contracts pro-

vided for the use of surplus water in the canals in order to make up for the natural overflow on Miller & Lux lands, and in consideration of the grant of the right to divert this additional three hundred and fifty feet this right was again confirmed to Miller & Lux (Exhibit 10, pp. 1086-7).

Subsequently and on the 4th day of June, 1901, a further agreement was entered into between Miller & Lux and the Canal Company allowing the Canal Company to divert up to thirteen hundred and fifty (1350) cubic feet (Complainant's Exhibit 12, pp. 1094-5).

Like agreements were also entered into with the California Pastoral & Agricultural Company (Complainant's Exhibit 11, p. 1088; Complainant's Exhibit 12, p. 1094), that company also being the owner of large tracts of riparian land along the river (Trans. p. 349). It appears that ever since those contracts, there have been certain waste gates on Miller & Lux land, and whenever there was more water in the canals than was demanded by the public, it was turned out of these waste gates and was picked up and used on the uncultivated lands of Miller & Lux, the Canal Company receiving nothing therefor (Trans. p. 450). Even defendants' witness Rouse admitted that the water was never wasted out of the canal except when it was not required by other people (Trans. p. 653).

Notwithstanding these contracts which permitted the Canal Company to waste this water onto Miller & Lux's uncultivated lands, and permitted Miller & Lux to use it without charge, the court charged the Canal Company with \$10,000 a year for this water, and likewise, notwithstanding the contract fixing the rate which the company could receive, the court charged the Canal Company with the full rate for water sold to Miller & Lux, making an additional charge over the amount

received of four thousand one hundred and eight dollars and sixty-five cents (\$4,108.65), and at the same time refused to allow the company any return on the rights acquired by reason of these concessions. The only way in which it is sought to justify this course is that the early contracts of 1871 and 1872 did not, in terms, expressly grant any water rights to the Canal Company. It is difficult to see what bearing this would have in view of the fact that the latter contracts did expressly grant water rights and were expressly granted in consideration of a recognition of these rights of Miller & Lux under the early contracts. But however this may be, the case is simply in this situation: that the predecessor in interest of the complainant made certain contracts with the riparian owners; it appears without dispute that the water could not have been diverted without the consent of the riparian owners; that these contracts did amount to a consent by the riparian owners, and it is obvious that, as the subsequent contract shows, it was on account of this fact that these contracts were executed. At any rate, by reason of them the Canal Company did acquire these water rights, and having acquired them at the expense of the special privileges which were granted, it should either not be charged with the loss by these privileges or receive a return upon the property actually obtained in exchange therefor.

**THE COURT ERRED IN ONLY ALLOWING THE AVERAGE MAINTENANCE SO FAR AS CANAL CLEANING AND LEGAL EXPENSES ARE CONCERNED, INSTEAD OF THE ACTUAL EXPENSES INCURRED DURING THE YEAR FOR WHICH THE RATES WERE IN FORCE.**

The evidence in the case shows that so far as canal cleaning is concerned the company in this year actually

expended \$15,760.44, and still it is only allowed \$6,074.23, for the reason that that was only the average amount expended over a long period of years. In the former case it appeared that the canals had not been cleaned for some years and the silting of the canals was then used as an excuse for depreciating their value to the extent of the silting, and no allowance was made for canal cleaning which in fact was not done. In the year in which these rates were in force, the canals were kept free of silt (Trans. p. 315), and still the court refuses to allow us the expense actually expended in keeping them in that condition.

It appears that the canal system of plaintiff has been gradually expanded and naturally the cost of moving the silt from the canal has correspondingly increased. Then again, it is not disputed that the cost of work of that kind has gradually increased, so that to allow the mere average covering a long number of years is not a proper method of arriving at the actual expense necessary in the year for which these rates were in force.

In the same way, in regard to legal expenses, it appears that the litigation in regard to the water rights of the company did not develop until comparatively late years, and during late years it has grown to immense proportions, and for this reason it is equally improper to only allow the company the average legal expense over a long period of years. It is obvious that if the company were attempting to sustain a rate established by it in the earlier years of the company, or was attacking the rate established by public authority, it could not ask a greater amount for canal cleaning or for legal expenses than it actually expended during the year when the rate in question was in force. The mere fact that at some future time the expense might be greater would be entirely immaterial.

Since it therefore could not get an average amount higher than the actual amount expended, so it should not be held to an average amount less than the actual amount expended in the year to which the rate actually applied.

#### CONCLUSION.

We recognize that this brief is somewhat more voluminous than we would like, but we trust that the importance of the case is a sufficient justification therefor.

We feel that the case should be reversed and remanded to the lower court to reach a determination in accordance with such principles as may be laid down by this court respecting the important matters involved therein.

Respectfully submitted,

GARRET W. McENERNEY,  
FRANK H. SHORT,  
EDWARD F. TREADWELL,

*Solicitors for Appellant.*

ALDIS B. BROWNE,  
ALEXANDER BRITTON,

*Of Counsel.*

IN THE  
SUPREME COURT OF THE UNITED STATES

DOCKETED TERM 1912

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No. 303

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THE SAN JOAQUIN & KINGS RIVER CANAL &  
IRRIGATION COMPANY, INCORPORATED (A LIMITED  
FIRM), APPELLANT.

COUNTY OF STANISLAUS IN THE STATE OF CALIFORNIA,  
ET AL., APPELLEE.

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ORAL ARGUMENTS

BY

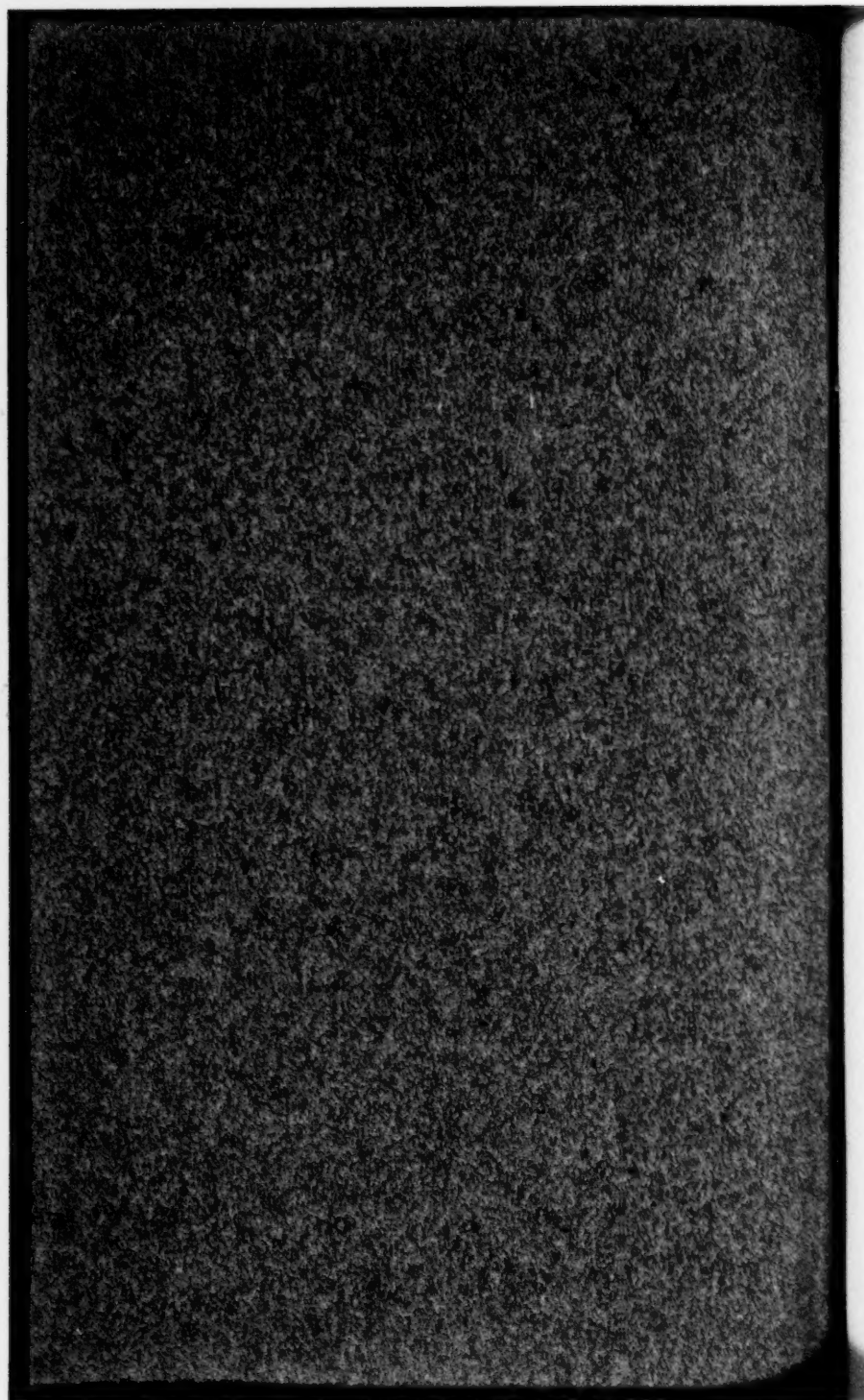
EDWARD F. TREADWELL,

For Appellant.

AND

JAMES P. LANGHORNE,

For Appellee.



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(24195)



IN THE  
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

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No. 303.

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THE SAN JOAQUIN & KINGS RIVER CANAL &  
IRRIGATION COMPANY, INCORPORATED (A CORPORATION), APPELLANT,

vs.

THE COUNTY OF STANISLAUS, IN THE STATE OF  
CALIFORNIA, ET AL., APPELLEES.

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WASHINGTON, D. C.,  
WEDNESDAY, March 18, 1914,  
12.30 o'clock p. m.

The above-entitled matter came on for oral argument.

Present: Mr. Chief Justice White, Mr. Justice McKenna, Mr. Justice Holmes, Mr. Justice Day, Mr. Justice Hughes, Mr. Justice Van Devanter, Mr. Justice Lamar, and Mr. Justice Pitney.

Present on behalf of the appellant: Mr Edward F. Treadwell.

Present on behalf of the appellees: Mr. James P. Langhorne.

**Opening Argument of Mr. Edward F. Treadwell on Behalf of the Appellant.**

MR. TREADWELL: May it please the court, this is a case involving the validity of certain local rates, established by

local authority, fixing the amount that the complainant should receive for the sale of water.

I wish to say to your Honors that, notwithstanding the apparent size of the record that is presented to this court, the facts are very simple. They are certainly very simple so far as they apply to this oral argument.

The CHIEF JUSTICE: You said "notwithstanding the apparent size of the record"?

Mr. TREADWELL: I say "apparent," your Honor, for the reason that we deemed it proper in a case of this kind, where the court has always held that it should have full power to review the case from the beginning to the end, notwithstanding the determination of the trial court, on account of the public nature of this case, we deemed it proper to bring the entire record before this court. So far as this argument is concerned, I shall state the facts, I think, inside of five or ten minutes.

As your Honors have recommended, the parties allowed these rates to remain in force for a year before the case was tried. As this court has also recommended, the case was tried by a special examiner, his findings were reviewed and modified by the court, and in that manner the final facts were found which are presented to this court.

By that process the court found the value of the complainant's property; it found that value after making many very serious reductions, which were seriously resisted by the complainant in this case. It found that value to be as follows:

It found the value of what might be termed the tangible property of the company, that is, its canals, structures, etc., to be substantially nine hundred thousand dollars. It found that the water rights owned by this company were substantially of the value of one million dollars.

In the same manner the court, after charging this company with the receipt of many thousands of dollars which it never received in fact, reached a conclusion as to what the income of this company was or should be, and in the same manner, after disallowing a great many thousands of dol-

lars which were actually expended in the conduct of its business, found the necessary amount to be expended by the company for maintenance, etc.

It is admitted, your Honors—it is admitted by all the parties here before the court—that upon the value thus found by the court, upon the receipts thus found by the court, and upon the necessary cost of maintenance thus fixed by the trial court, the return that these rates give is only a trifle over three per cent on the value of the property as fixed by the court.

It is admitted by counsel on the other side, as it had to be admitted, that, irrespective of any constitutional rights of the complainant in this case, under the terms of the statute of the State under which these rates were fixed, it was absolutely entitled to a return of at least six per cent on that value.

The question then arises, How was this extraordinary result reached? It was held in this way, your Honors, and this was the ground upon which it was based by the trial court, and the ground upon which counsel attempts to sustain it in this court: The court held that it did not make any difference how this company had acquired these water rights; it did not make any difference how much they may have cost the company to acquire them, it was entitled, under the laws of the State of California, to absolutely no return of any kind or character upon that valuable and important character of property.

So that the court may have no doubt as to the proposition that I present in this case I wish to say that counsel, on the arguments in the lower court, expressly stated—and he has stated in his brief in this case—that if the complainant in this case had gone out and condemned and acquired by condemnation the water rights which are involved in this case, and the value of which has been fixed, if the company had paid the judgment of condemnation in the sum of \$1,000,000—he contended openly in the lower court and is contending in his brief here—that it would be entitled to no return whatever on the value of the property thus acquired.

If the court please, as I have said, that is the only question that I desire to argue on this appeal.

Mr. Justice McKENNA: What is the foundation for the decision on that point?

Mr. TREADWELL: I will come to that, if your Honor will permit me.

The appellant has asserted other grounds why this judgment should be reversed, but they are not questions which we deem easily or properly argued orally. We wish, with the consent of the court, to submit those questions merely on the briefs, which are very thorough indeed.

I wish to say further that, in view of the fact that the trial court found not only the existence of these water rights, but their value, in a manner that was entirely satisfactory to us, it is not necessary for us, at any great length, to either state to the court the value or the evidence that was introduced as to the value of these water rights or the manner in which they were acquired.

I may say, though, that the evidence in this case shows without any dispute, and it is not disputed in this court, that as early as 1871 this company commenced the diversion of water from the San Joaquin River; the evidence shows that from time to time, as the exigencies of the occasion required, it obtained from the various riparian owners along the river contracts which fixed its right to divert that water, regulated the measure of the right, and provided conditions upon which that diversion should be continued. It is admitted in this case that that was not only continued for the statutory period of five years, which would give a prescriptive right under the laws of the State, but it was continued for something like forty years before this case was tried and before the first ordinances were adopted.

It is furthermore shown in this case that finally when a riparian owner, with whom there was no contract, did object to this diversion, it was adjudged that he was too late, and that a prescriptive right to divert the water had been acquired against him by a diversion for the statutory period.

I will also say to the court that we introduced a great deal of evidence in order to fix the value of these water rights, and one class of evidence that we introduced as to the value of the rights was evidence which we held and thought tended to prove, and did prove, and which at any rate was introduced for the purpose of attempting to prove, what we actually paid for these water rights; and we contend now, and contended in the lower court, that that evidence shows that the water rights had actually cost the company, irrespective of maintenance expense to protect them against the assault of all the world—we contended that the evidence in this case actually shows the payment of something like \$450,000.00 for those water rights. But I want to say candidly that counsel on the other side controverts that proposition. He controverts the proposition that they cost us anything whatever. So far as this oral argument is concerned, I would prefer that we should proceed on the basis that there is not any evidence as to what this cost was, because we introduced evidence as to the cost simply for the purpose of assisting the court and aiding the court in finding the value of this property. The court having found the value in a manner that is entirely satisfactory to us and satisfactory to the appellees, the question as to exactly what this cost was becomes an entirely moot and immaterial question.

Before presenting this question I also want to refer to one other matter in this case. In the lower court some very interesting, important, and difficult questions arose in regard to whether or not the complainant should be charged with certain sums on account of the fact that it had entered into various contracts with riparian owners by which these riparian owners, in consideration of certain rights which they granted, got certain special and reduced rates. Counsel for appellees contended in the lower court with great earnestness that those discriminatory rates must be disregarded and that the complainant must be considered to have re-

ceived the full rate, irrespective of those contracts. The lower court so held, your Honors, and upon this appeal to this court we are in no way questioning the correctness of the action of the court in charging us with all of the thousands of dollars which we did not receive, and which we could not receive under those contracts with those particular riparian owners along that stream. Notwithstanding the fact that in our brief we admit that, and state in as clear a manner as possible that we do not question the correctness of that matter, appellees' brief from one end to the other is full of argument upon those discriminatory contracts. I assume, and I certainly assume it honestly, that that was due to some misapprehension as to our contentions in this court, because counsel certainly did not put it in his brief for any other reason. We are perfectly willing to assume any blame for that misunderstanding; but we have stated in our reply brief, as we have stated here, that we in no way question the correctness of the ruling of the court on that subject, and it is folly to take the time of this court, under the circumstances, in discussing the question that these discriminatory contracts must be disregarded, and that we must be charged with any loss suffered thereby. Counsel for appellees have made that argument, and they have had the benefit of the argument in the decree entered in the case and in the findings that are here under review.

The question then arises, as suggested by Mr. Justice McKenna, What was the basis of this decision? I might say it is a somewhat extraordinary decision in this—that State courts or Federal courts, either in a condemnation there is not another case in the United States, either in the proceeding or in a rate-fixing proceeding, or any other kind of a proceeding, where such a rule has been enunciated. I want to say, further, that within three weeks after the decision in this case the very same court in which this case was decided, presided over, however, by another judge, notwithstanding the rendition of this decision, gave to another

water company, in fixing its rates, a valuation of many millions of dollars on its water rights, and by giving that valuation held that the rates established for that company were in violation of the Constitution of the United States, and held them to be absolutely illegal and void.<sup>1</sup>

In arguing this case I shall not say anything upon any general principles whatever, but shall come right down to the very propositions upon which the appellees base their contention, and the particular grounds upon which the trial court based it.

In the first place, they say that the waters of the State of California before appropriation, use, or diversion at all were public waters, and were the property of the people of the State of California. That is the very first proposition. Your Honors are no doubt considerably familiar with the different views as to water rights in the Western States. You no doubt have heard of what has been called the Colorado system, which system was enacted when the State was first brought into existence, and under which the waters were, in the most formal manner, declared to be the property of the State and to be public property.

Your Honors have also heard of another doctrine, more nearly the doctrine of riparian ownership, which is generally called the California doctrine, the doctrine that the property in the waters is not in the public; that it is not in the people; that it is not in the State, and never was; but, on the contrary, that the water is a part of the land; that it was first in the United States when the United States owned the land, not as a sovereign, but as a proprietor of the land; that when the land, to a certain extent, passed to the State, the water rights passed to the State as a proprietor, but not as a sovereign; that when these lands passed from either the State or the United States to an individual, the water, as a part and parcel of that land, passed to the individual. Not-

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<sup>1</sup> Spring Valley Water Works vs. San Francisco, 192 Fed., 137.

withstanding this, your Honors, once in a while we do hear of some one making the loose statement that the waters are still the property and were the property of the people and of the public.

If there were any excuse whatever—and I presume there must have been—for the decision at the time that it was rendered in this case that the waters of the State of California were the property of the people or the property of the public, or the property of the State as a sovereign, there is no excuse for it at the present time. Since the decision in this case at bar the matter came up distinctly before what we call, in California, the Railroad Commission of the State of California. It is now a Public Utilities Commission, having charge of all public utilities in the State of California, whether they are locally situated or generally situated throughout the State. It is a board which has power to fix rates of all public utilities practically in the State of California.

Mr. Commissioner Eshleman, a very bright young lawyer and chairman of the Commission, had occasion to deal with this particular subject, and in just these few words he disposed of this, which I term a legal heresy, so far as the law of our own individual State is concerned. He says:

“It has always been difficult for me to understand how such almost hopeless confusion should have been the result of these plain provisions of the constitution and the statutes, provisions so utterly unrelated; but we find the law writers and the court saying that the waters of the State belong to the public (as they do by the constitutional provisions in some of the Western States) by reason of the two sections of article XIV of the constitution which do not remotely bear on the subject.”<sup>2</sup>

The parties were not satisfied with that, and probably properly not satisfied, it being only a high character of

<sup>2</sup> *Palmer vs. So. Cal. Mountain Water Co.*, decision No. 418.



quasi-judicial board, and they therefore took an appeal in that case to the Supreme Court of the State of California. The Supreme Court, with a great deal of patience, it seemed to me, sat down and dealt with this subject, and again restated what the basis of water rights were in California, confirming the statement of the Railroad Commission, and finally stating their conclusion in this very brief language:

"The doctrine that it is public water, or that it belongs to the State because it is not capable of private ownership, has no support in the statutes of the State or in any decision of this court."<sup>3</sup>

Mr. Justice HOLMES: What case is that?

Mr. TREADWELL: That is the case of *Palmer vs. The Railroad Commission*. Your Honors will find it in full as an appendix to our reply brief.

Mr. Justice HOLMES: Where is it reported?

Mr. TREADWELL: That is the reason it is attached as an appendix, because it is not officially reported. It was decided January 20, 1914. We have put into our brief a complete copy of it, from the title to the end of the decision.

Mr. Justice HOLMES: It is not reported in one of the reporter systems?

Mr. TREADWELL: No; it is not. That is the reason we have put it in in that way. We do have a local report, but I did not suppose your Honors would have access to that.

That, your Honors, is all I care to say on that foundation, and the principal foundation for this decision.

The second foundation upon which they base it is that they say that by some means, which I must admit I have never been able to have explained to me by counsel, the constitution of the State of California adopted in 1879, some seven years after these waters were first diverted, in some

<sup>3</sup> *Palmer vs. Railroad Comm.*, decided January 20, 1914 (see appendix to appellant's reply brief).

way impressed those waters with a public use, and at the same time it impressed them with a public use it took away the property right in them and all right of compensation for anything that they impressed with that public use. They base that on this language of the constitution of 1879:

"The use of all water *now* appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use and subject to the regulation and control of the State, in the manner prescribed by law."<sup>4</sup>

Then the constitution went on and provided that the rates at which that water should be rented, sold, or distributed should be fixed by boards of supervisors of the various counties, or otherwise as provided by law.

Now it is on that language, and that language alone, that the appellees here contend, and the trial court held that in some mysterious manner the constitution impressed these waters with a public use and at the same time took away from the owner the right to receive any compensation either then presently or thereafter in the payment of a rate for taking that water from them and vesting it in the public.

There are two things that your Honors should notice in regard to this provision. In the first place, it applied just as much to waters that were then in private ownership as it did to waters that might thereafter be acquired. I do not believe that it would be any great task to convince this court that the legislature could not simply, by its say so, take away these properties that were then in private ownership and vest them in the public without any compensation. But I say I do not wish to orally argue that proposition, because it would be unfair to the people who adopted the constitution of the State of California to say that they intended any such confiscation of private rights.

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<sup>4</sup> Cal. Constitution, Art. XIV, Sec. 1.

The second thing that is to be noted in regard to the enactment is this: Your Honors will notice it says "the use of all waters now *appropriated*." It has been held, and it is admitted by counsel on the other side that it has been held——

Mr. Justice HUGHES: Where is that to be found?

Mr. TREADWELL: It is found on page 25 of the opening brief.

The courts have held that the word "appropriated" in that section does not mean appropriated in the sense of appropriating water from a stream. In other words, they have held that the word "appropriated" there means "devoted." In other words, they have held it does not make any difference to the water company acquiring those rights whether it acquired them by appropriation, followed by prescription against the riparian owner, or whether it acquired them by purchase from the riparian owner, or whether it acquired them by condemnation against the riparian owner, or whether it acquired them by purchase from some one else—it owns them. This constitutional provision is judicially held, and counsel admit that, to read as follows:

"The use of all water now devoted, or that may hereafter be devoted, for sale, rental, or distribution, is hereby declared to be a public use and subject to the regulation and control of the State, in the manner prescribed by law."<sup>5</sup>

It is on that provision, which says that because you have water now which you have purchased and paid for, and because the State declares that that is a public use—they say that that took the ownership of the water away from us and vested it in the public, and also at the same time took away from us any right to recover any return upon it whatever.

Before citing the decision of the Supreme Court of California on this subject I want to say that there seems to be

<sup>5</sup> *Merrill vs. Southside Irrigation Co.*, 112 Cal., 427.

some lack of appreciation between the impressing of property with a public use and the dedication of property to a public use. In other words, the owner is the only one that can dedicate a particular piece of property to a public use. It is not claimed that this company has ever dedicated this property to a public use, in the sense that it has given it to the public without compensation; but, on the contrary, the purpose of this company, from its very inception, has been to distribute it for gain and profit, and it has never attempted to give anything to any one or to give any of its property to any one without compensation. Nor is it claimed that it ever did so.

When you come to impressing property with a public use, any particular property, the owner is the one that impresses the particular property with a public use. All that the legislature does is to declare that certain things are public uses; that certain kinds of business constitute a public use, and then if the owner does engage in that business he *ipso facto* does impress that particular property with the public use which the legislature has fixed.

Mr. Justice PITNEY: The intention of the legislature was to lay the foundation for the use of the power of eminent domain.

Mr. TREADWELL: Yes. That contention is referred to by the court. They have all been granted the power of eminent domain. The Supreme Court of our State has time and again said that the only way that companies of this kind can get any water in the State of California is by the exercise of the right of eminent domain against the riparian owner, or by contract with him. They have time and again enjoined any company from taking any water away from the riparian owner.

I do not intend to say anything further about the construction of this constitutional provision, because it is admitted on all hands, or at least it must be admitted on all hands, that the Supreme Court of the State of California is

the final tribunal to construe the constitution of the State of California. That the Supreme Court of California has construed this constitutional provision, and construed it contrary to the decision in this case, is settled beyond any dispute whatever. Therefore, in citing the decisions of that court, I want to very briefly use the language of the Supreme Court itself, rather than my own language, so that there can be no question in the minds of your honors that I am stating simply the language of the court, and nothing else. As early as the case of the *San Diego Water Company vs. San Diego*,<sup>a</sup> the court took up this provision of the constitution and said:

"In effect, the State may be said to have appropriated the water and the plant to public use. For that appropriation it is bound to make just compensation, and it has provided for such compensation by requiring the municipal authorities to fix just or reasonable rates at which the water is to be furnished to and received by the consumers. Since the State has 'taken' the use of this property, it is bound to provide a just compensation for that use, and Article XIV of the constitution must be construed as providing for that just compensation."

Mr. Justice HOLMES: Is that case in the One Hundred and Eighteenth California Report?

Mr. TREADWELL: Yes; 118 Cal., 556.

In *People vs. Elk River M. & L. Co.*, 107 Cal., 221, the court said:

"Certainly it was not intended by that provision to appropriate such waters for the use of the public without compensation."

After that decision the matter came up before the Circuit Court of Appeals of the circuit in which the case at bar was decided in the case of the *San Diego Flume Company vs. Souther*, in the 90th Federal Report, 164, and the court said this:

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<sup>a</sup> 118 Cal., 556, 567, 568.

"Corporations engaged in the business of furnishing water for irrigation, under the laws of California, whether they acquire the water by appropriation of the waters of the State or otherwise, are private corporations. They are nowhere declared to be public corporations or quasi public. \* \* \* The use is public only to the extent that the corporation may be compelled to furnish the water, provided it has the capacity to do so, to all who receive and pay for the same, and that the rate of compensation shall be fixed by the law in case the parties cannot agree."

While the *Souther* case was pending in the Circuit Court of Appeals, and while that court was uncertain as to how it should be decided, in view of the fact that Judge Ross, of the Southern District of California, had the same view that counsel for appellees has, and he had decided the *Souther* case in the Southern District of California—while they were holding that case under advisement so as to get the very best law on it, the Supreme Court of California, in a decision in the case of *Fresno Canal Company vs. Park*, 129 California, 437, took up the whole matter and settled it in this language:

"This contention"—referring to the contention that because these water rights were public property the Canal Company could not enter into a private contract with the consumer, fixing the rate at which he should receive the water—"rests on the proposition that \* \* \* the Constitution gave the legislature power by inaction to destroy all property in ditches and *water rights* used for the distribution and sale of water. This proposition cannot be maintained. \* \* \*

"Is it possible that the Constitution intended to practically destroy or confiscate all this immense property or to allow the legislature to do it? It could not have accomplished this result within the principles of the Federal Constitution, and it is not to be held that it intended to do so unless the language of the Constitution leaves no doubt on the subject."

Now, the most peculiar thing is that, when the Court of Appeals in the *Souther* case came to decide the matter, it decided it on the ground that the Supreme Court of the State of California had given a final interpretation of this matter, that that was binding upon the Federal court, and it therefore followed that decision.

Still later the court, in the *Stanislaus Water Company* case<sup>7</sup> used this language,—I refer to the Supreme Court of California:

“If the water right of the Stanislaus & San Joaquin Water Company was in private ownership and use at the time the Constitution of 1879 was adopted, we do not see how it could become dedicated to public use by the adoption of the constitution or at all, except by consent, express or implied, of its owners.”

The Constitution of Idaho is exactly, word for word, the Constitution of California, and the Supreme Court of Idaho said in four lines, in the case of *Witterding vs. Green*,<sup>8</sup> as follows:

“The sale, renting and distributing of the water is a dedication and brings its use under control of the State, but it in no sense destroys or abrogates the property rights of the appropriator therein.”

But notwithstanding all these decisions, this whole matter had to be taken up, in the last two years, before the Supreme Court of California again, for reasons which I will explain to your Honors in a moment; but briefly, because Judge Ross, of the Southern District of California, for whom I have the highest regard, has always had an erroneous impression as to the meaning and effect of this constitutional provision. It is not criticism to call attention to the fact that he has been time and again reversed in that opinion, but for some reason or other he seems unable to change it, as I will show your Honors in a moment.

<sup>7</sup> *Stanislaus Water Co. vs. Bachman*, 152 Cal., 716.

<sup>8</sup> 45 Pac., 134.

In the case of *Thayer vs. California Development Company*, which was both in the Federal court and in the State court, the State court, in 164th Cal., 117, took this matter up again, and said:

"The language plainly imports that the right, when acquired, is the property of the person who claims it, and takes the steps prescribed to gain it." That is referring to the water right of a public service company. "And generally, it is true that, even when property is dedicated or appropriated to public use for gain by persons or private corporations, the title and ownership is private and the only interest of the public is that of beneficiary of the use or trust. The property does not become impressed with a public use or trust until after the owner has first acquired it, and then dedicated it to the use. The acts of acquisition and of dedication, respectively, are distinct from each other. Technically, the latter must follow the former and cannot precede or accompany it.

"An 'appropriation of water' under the Code is therefore not, *ipso facto*, a dedication or appropriation to public use. The additional act of dedication is as necessary to the creation of a public use in a water right so acquired as it would be if the right was acquired by conveyance or in any other manner, or as in the case of any other property dedicated to public use."

But, as I said, this matter was brought to the Supreme Court again in this *Palmer*<sup>9</sup> case, and they contended in that also that even if it was not public water before it was appropriated, it became public water after it was appropriated by a public service corporation. The Supreme Court again had to decide that, and they have decided it within the last month, saying:

"It follows that they remain private property when they pass to purchasers, and that when they pass from

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<sup>9</sup> *Palmer vs. Railroad Comm.*, decided January 20, 1914 (see appendix to appellant's reply brief).



the riparian owner to others by prescription, grant or consent, they do not by that transfer become impressed with any public use, and it still remains true that there must be a dedication to public use to divest the private right. They are no more public than is the land to which they belonged and of which they formed a part."

The matter also came before the Supreme Court within the last few months in regard to a public service telephone company, and it was contended to a certain extent that their property was public and in public ownership rather than in private ownership merely impressed with a public use with power to regulate and control. In fact, it was contended in that case that the railroad commission could practically take the telephone company's property away from it and turn it over to a rival concern for connections, etc. In the course of its decision the Supreme Court disposed of that in this language:

"And finally, it may not be amiss to point out that the devotion to a public use by a person or corporation of property held by them in ownership does not destroy their ownership and does not vest title to the property in the public."

Mr. Justice HOLMES: Is that in your brief?

Mr. TREADWELL: Yes.

Mr. Justice PITNEY: What is the name of that case?

Mr. TREADWELL: *Pacific Telephone & Telegraph Company vs. Eshleman*, Mr. Eshleman being president of the railroad commission. It is in 137 Pacific, page 1119. I think you will find it in the reply brief.

That is all I care to say as to the determination by the Supreme Court of California of the meaning of this constitutional provision, except a few remarks as to one particular case decided by Judge Ross and relied upon by appellees, which I will come to later.

The next contention that they make in support of the contention that we are not entitled to any return is, that they say we are an agent; that the company is a mere agent of the public and is a common carrier of public property entitled to only a carriage charge, or the expense of carrying it, but entitled to nothing for the commodity which it furnishes to the public. In other words, they say that we are entitled to a return on the mere skeleton of our plant, but that the real life-blood of the plant itself, that which the public wants and desires, namely, the water, we are entitled to nothing for it at all, on the theory that we are an agent of the State carrying the water of the State.

MR. JUSTICE MCKENNA: Their position is, that you are entitled to a return upon the amount of money put into the ditches, but you are not entitled to a return upon the water that you carry in the ditches?

MR. TREADWELL: That is it. The contention of agency in this regard is extremely difficult to understand when applied to the State of California. In other words, the canal company, without seeking the desires of anyone, spends its own money, not the money of the State. After it has built its canal, if it loses the opportunity to divert water—and I will say there are hundreds of canals that have been built, and I do not believe I exaggerate, that have not been able to divert any water whatever—it loses its money. The State does not lose it. The State puts up no money; it does not control them in any way, shape or form, and still counsel says that we are an agent of the State.

Now, I will state to your Honors that under the laws of Colorado there would be some basis for this contention. As I have already stated, under the law of Colorado this water is public water, and the only water companies that are allowed in the State of Colorado are companies to “carry” water; not companies to own or appropriate water, but simply companies to “carry” water.

The difference between the law of California and the law of Colorado has been pointed out by the Supreme Court of California in the following language. Referring again to the *Park* case,<sup>10</sup> they say:

"But the latter are, we think, mainly founded upon the provisions of the Constitution of Colorado, *materially different from the provisions of our Constitution on the subject*, which (the Colorado Constitution) declares that the water of all natural streams, not theretofore appropriated, is the property of the public."

The Supreme Court of Idaho, in the *Wilterding* case,<sup>11</sup> disposes of the matter in this way:

"The marked distinction between the provisions of the Constitution of Colorado and that of Idaho will be apparent upon a slight inspection of the two.  
\* \* \* The Idaho Constitution does not pretend or assume to control or interfere with private property rights in such waters, but declares the use of all such waters, whether theretofore or thereafter appropriated, a public use and under the control of the State. *The doctrine of the Colorado court, that the canal or ditch owned is a mere common carrier, could not certainly be predicated upon the provisions of the Idaho Constitution.*"

Mr. Justice DAY: What is the source of this water supply?

Mr. TREADWELL: The San Joaquin River.

That same proposition was referred to in the *Souther* case,<sup>12</sup> where it was held that the Colorado Constitution was different from the California Constitution, and it was also referred to by the Railroad Commission in the *Palmer* case.

Notwithstanding that, your Honors, the decision in this case at bar directly bases its position on those Colorado cases.

<sup>10</sup> *Fresno Canal Co. vs. Park*, 129 Cal., 437.

<sup>11</sup> 45 Pac., 134.

<sup>12</sup> 90 Fed., 164.

Mr. Justice PITNEY: I understood you to say that the time of the acquisition of the water rights is a part of the point you make; that they were acquired wholly or in part before the constitutional provision?

Mr. TREADWELL: That is part of my point, your Honor; that they were acquired as early as 1871.

That brings me to the next contention of counsel, and that is the reliance they place upon certain decisions rendered by Judge Ross, of the Southern District of California. I do not intend to take the time in this oral argument to in any way review those decisions, because that has been done in an entirely satisfactory manner in our brief. It is shown there that these decisions were first distinctly disapproved by the Supreme Court of California; secondly, they were distinctly disapproved by the Circuit Court of Appeals of the Ninth Circuit. Later, Judge Ross became a member of the Circuit Court of Appeals of the Ninth Circuit, and in a case that did not involve the questions at all, he again used some of the same language that had been disapproved by the Circuit Court of Appeals in the *Souther* case, and which had been disapproved by the Supreme Court of the State of California. As I say, in a case that did not involve the questions at all he reasserted the early view that he held on the subject as to the effect of the constitutional provision. Strange to say, while Judge Morrow, who decided the case at bar, was himself a member of the Circuit Court of Appeals that disapproved Judge Ross' early decision, followed the decision of the Supreme Court of the State of California, and held that he not only followed it because it was right, but because he had to follow it anyhow, because the Supreme Court of California was the final tribunal to say what the Constitution of the State meant; still, in the decision of the case at bar, he follows the decision of Judge Ross, which he himself had helped to overthrow and which the Supreme Court of California has time and again overthrown in its many decisions.

But there was one case by Judge Ross that requires particular treatment. That was the case known as the *National City* case,<sup>13</sup> in which the company made this, to me, rather absurd contention: The canal company in the *National City* case contended that notwithstanding that the board of Supervisors had fixed rates which the company might collect and that the ordinance was in force and was not questioned—but notwithstanding the ordinance, and taking no notice of it whatever, before a man could get water they could put an arbitrary exaction on him and make him pay a certain amount for what they denominated a “water right.” In other words, they said they would make the consumer pay for the *right to receive the water* a certain sum which they would fix, notwithstanding the board of supervisors had established another rate for the receipt of the water.

That was all that was involved in the *National City* case. There was no question of the correctness of the decision—that the company had no right whatever to make that arbitrary exaction, because whatever we are to receive, or whatever any water company is to receive, is a rate that is established, and legally established, and the rate as established is supposed to take into consideration all the property, whether it be water or anything else, which the company has, and it must be sufficient to fully compensate it. For a company to come out and say to a man who is already entitled to the water, “Before you receive the water you have got to pay me something for receiving it, in addition to the established rate,” is of course a proposition that could not be upheld for a moment.

I only refer to this because it was in that connection that Judge Ross held, and properly held, that there was no basis for a charge for *that kind* of “water rights.” There undoubtedly was not. I refer to it particularly for the reason

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<sup>13</sup>San Diego, etc., Co. vs. National City, 74 Fed., 79.

that the case was appealed to this court and the opinion was written by Mr. Justice Harlan. Mr. Justice Harlan was very careful to point out that the contention of the water company in the case was to make a charge *in addition to the rate fixed by the Board of Supervisors*, an arbitrary charge for the right of the consumer to receive the water, which right he undoubtedly had as a member of the public. That was reported in 174 U. S., 739.

The last point, and no doubt the word "last" will be welcome to the court, that they urged to sustain this contention is this:

They say that if the State should now seek to condemn our water rights the compensation which would be fixed would not go to us but would go to the consumers, or the public. Now, seriously, I suppose, they would also contend that if they condemned our canals and our rights of way and other properties, that, instead of paying us the damages that would be fixed, they also would go to the public. That, your Honors, is the statement in the opinion in this case and reiterated by counsel in this case, that if the State should now condemn, by the process of eminent domain, these property rights, which they admit that we own, we would not get the compensation fixed by the judgment of condemnation, but the consumers of the water, which are a part of the public—the plaintiff in that action—would get that compensation.

The CHIEF JUSTICE: We will suspend at this point until 2:30 o'clock.

(Whereupon, at 2 o'clock p. m., a recess was taken until 2:30 o'clock p. m.)

#### *After Recess.*

The court met pursuant to recess at 2:30 o'clock p. m.

Mr. TREADWELL: At the time court recessed I was just going to briefly refer to the suggestion made, that if these rights were condemned the compensation would go to the consumer and not to the company.

The company owns the legal title to this property, both its canals and its water rights, and it also owns the right to receive compensation for them in the nature of rates. That is the only property that the company has. They are already impressed with a public use. So far as the actual use of them is concerned, the public are entitled to that, anyhow.

If the rights of *the company* are condemned, namely, the legal title to the property, and also its right to receive compensation for the use of that property, why, it would simply be elementary to say that the compensation would necessarily go to the one that owned that particular property right. If some one should suggest that the right which the consumer has to receive this water could be condemned by the State, then it might be argued that they should receive compensation in case *that right* were condemned. It is hard to conceive of the State doing such a thing as condemning the right of a particular member of the public to enjoy this water. But assuming for the moment that the State should come in and attempt to take this water away, or the right to receive it, away from the particular community that is in fact enjoying it, and take it away to some other county or some other part of the State and give it to some other part of the community, I do not think it is necessary in this court to argue at this time whether or not the part of the public that is now enjoying it could be said to have a property right which could be taken away from it without compensation.

Of course, off-hand, under the decisions as they now stand, it would seem that they have not any property rights, but that simply as a member of a community they have the right to enjoy a thing that is impressed with a public use.<sup>14</sup> So far as the law stands under the decisions, it is not at all clear that it is a property right at all. If the State should do such an unheard-of thing as to condemn that right, why,

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<sup>14</sup> Leavitt vs. Lassen Irr. Co., 157 Cal., 82.

I suppose it would necessarily follow, if it were a property right, that they would have to pay these people for it. But that is no answer to the proposition that, if they take *our* property, that which the decisions say is our property, and attempt to condemn *it* and take *it* away, they must necessarily pay us the compensation which the law entitles us to receive.

Those, your Honors, are the only points relied upon by the court or by counsel to sustain this position. Each one of them is answered by the decisions of the Supreme Court of California, and I will simply refer your Honors to those decisions.

I thank you.



**ARGUMENT OF MR. JAMES P. LANGHORNE ON  
BEHALF OF THE APPELLEES.**

MR. LANGHORNE: May it please your Honors, according to counsel's statement, I am here to defend what practically amounts to highway robbery. But I submit, may it please your Honors, that there is a good deal in this case which counsel has not referred to.

While I have in my brief, and I will in argument before I am through, attempt to answer counsel's position as to the main point in regard to water rights, nevertheless I desire to call the court's attention to certain parts of this record which we claim will show conclusively that it is immaterial in this case whether or not these water rights were valued or not in the matter of fixing the rates.

In the first place, under the irrigation act, which is set forth as an appendix to our brief, it is provided with great particularity that the parties shall be fully heard before the rate-making board, namely, the supervisors of the three counties in this case, the counties of Fresno, Merced and Stanislaus.

This canal leaves or takes out of the San Joaquin River in Fresno County; it flows northwesterly at some distance from the river for a distance of about 75 miles. It has probably, with its laterals and parallel canals, an entire length of some 200 miles.

Under the act of 1885, as I stated, there are provisions for the hearing of proceedings to fix rates. The property-owners, the irrigators or land-owners are entitled, by petition to the board of supervisors, to call the company before it to fix the rate. After the rates have been once fixed it is provided that they cannot be again fixed for a year. At the expiration of a year from the time the rates have been fixed either the inhabitants of the county or the canal company can petition the board of supervisors to fix the rates anew.

In this case the rates of 1896, in regard to the county of Stanislaus only, went before this court and were sustained by this court. That case is reported in the 192d U. S. After the decision in that case the three counties fixed the rates again in 1904. Then again, upon the application of the complainant in this case, the canal company, in 1907 the rates were again fixed, and those are the rates in this record and before this court.

The canal company appeared before those boards, and the proceedings before those boards are in this record. We introduced those proceedings before the master in chancery in this case for the express purpose of showing that they made no mention or reference to water rights, as they had not done in the pervious case. They came to this court in regard to the rates of 1896 and there was not a word of testimony or of argument with reference to any water right; there was not any claim that they owned any water right, and absolutely no testimony or showing before the rate boards as to the value of any water rights.

The proceedings before these boards are set out in the record. They were introduced, commencing at page 642. Counsel here present was there at the time and they were introduced before the master. Counsel was asked by me, "You do not object to the introduction on the ground that the document does not properly represent what was done, do you?"

"MR. TREADWELL: No; subject to my objection that it is improper testimony and irrelevant and incompetent to this proceeding. Of course these particular papers I am going to admit show the proceedings that did take place without the production of the certificate, copy or copies, or any other evidence."

This evidence itself is contained in volume 2 of the record and is certified to by the short-hand reporter that took the proceedings as being a full copy of all the proceedings. There is not a word in these proceedings before these boards,

not a claim made by this company that it owned any water right or that it had any value.

In a brief that counsel has filed here a few days ago he intimates that certain documents were filed which showed that they had paid \$112,000, when this company bought out another company, for certain water rights. But counsel is mistaken about that. Reference to the proceedings before the boards of supervisors will show that their secretary testified that the original cost of the plant was something like \$1,000,000, and the statements that counsel refer to were not introduced until the trial before the master in the circuit court. Those statements, if they had been introduced before the supervisors, would not have helped counsel out in that regard. The item that he relies upon as having been paid for water rights, \$112,000, was paid to John Bensley for water rights, etc. Other portions of the record show that that \$112,000 was not only paid for water rights, but for construction. So there is really nothing in the record to show that anything was paid for water rights.

But the point I make at this time, may it please your Honors, is this: Here is an attack upon a rate order made by the board of supervisors authorized by law, upon application made by the canal company itself, where they appeared with their witnesses and counsel and where the record of the proceedings before that board show that they put in testimony as to the original cost of the canal, as to the cost of reproduction, as to the value of their rights of way, as to the amount of acreage, as to the receipts, and, in fact, as to everything with the exception of water rights.

Mr. Justice HUGHES: Did they submit any schedule of property on which they claimed a return?

Mr. LANGHORNE: No; they did not. The secretary testified that the old books of the company, which had been destroyed, showed an investment of something like \$1,000,000; that is, a cost investment. They produced Mr. Goodwin, who had made an examination and physical valuation of

the canal, which is the same as Exhibit 1 in this record, showing the cost of reproduction——

Mr. Justice VAN DEVANTER: Are you speaking now of the proceeding before the board?

Mr. LANGHORNE: Yes; of the proceeding before the board of supervisors.

Mr. Justice VAN DEVANTER: What did this \$1,000,000 consist of; or was that shown?

Mr. LANGHORNE: It was not shown.

Mr. Justice VAN DEVANTER: Was it shown whether that did or did not include water rights?

Mr. LANGHORNE: No; just the mere statement.

They also introduced testimony as to the acreage irrigated for several years and also introduced statements in regard to their maintenance accounts.

The point I make is this, may it please your Honors: Here is a board organized by the State for the very purpose of fixing these rates. They initiated this proceeding upon their own motion; they introduced testimony presumably of everything they owned. They knew what they possessed. The board of supervisors did not know what property they owned, and they were not supposed to know it. In attacking the order that the board made, it seems to me that we are entitled to rely upon the record that this company itself made before that board.

Mr. Justice McKENNA: Was that petition for an increase of the rate?

Mr. LANGHORNE: No; not an increase. They petitioned to have the rate changed, and it possibly amounted to that.

Mr. Justice PITNEY: How was this matter of the withholding of evidence or the refraining from introducing evidence before the commission as to their investment in water rights dealt with in the pleadings in this case and in the master's report?

Mr. LANGHORNE: It is not referred to at all in the pleadings or in the master's report.

Mr. Justice McKENNA: How does it become important, then?

Mr. LANGHORNE: Well, for this reason: This court has said in a number of cases, and we claim that they cannot come in with a bill of equity in the United States court and claim that the rates of the boards of supervisors should be set aside because they were not allowed a valuation for their water rights when it appeared they never presented that question.

Mr. Justice VAN DEVANTER: You are relying on some cases relating to proceedings before the Interstate Commerce Commission where it has been stated that they must make a fair showing before that body, and if they do not they cannot make it in the first instance before a court.

Mr. LANGHORNE: There is a decision to that effect, which I have not in my brief, in the 227th U. S., page 88. I was referring especially to the case of the *Home Telephone and Telegraph Company* against *Los Angeles*, 211 U. S., 265, where this court refused to restrain the enforcement of a rate ordinance. Among other things the court said:

"It is to be taken into account in considering this, as well as other questions, that the appellant has declined to furnish to the council facts within its knowledge which would enable the council to exercise their powers intelligently and justly."

In the case of *Knoxville vs. Knoxville Water Company*, 212 U. S., page 1, the court, at page 18, speaking of the regulation of public-service corporations, said:

"It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated."

I cannot see, may it please your Honors, how they have any standing at all in a court of equity to attack those rates when the record shows that they have never introduced a

word of evidence or referred to it in any manner, shape or form.

Mr. Justice PITNEY: How did the circuit court come to make a finding on the subject?

Mr. LANGHORNE: There is no express finding on it.

Mr. Justice PITNEY: I understood from what your opponent stated that there was.

Mr. LANGHORNE: They did not set up in their complaint that the water rights had any special value——

Mr. TREADWELL: Yes, we did.

Mr. LANGHORNE: I am mistaken about that. It was \$760,000 and the referee found that it was somewhere between \$900,000 and \$1,000,000. The circuit court judge affirmed that finding, but allowed them nothing on account of water rights.

Mr. Justice McKENNA: The rates are allowed by the boards of supervisors of the three counties?

Mr. LANGHORNE: Yes.

Mr. Justice McKENNA: Did they estimate for the water rights——

Mr. LANGHORNE (interrupting): No, sir.

Mr. Justice McKENNA: Was the rate they allowed a fair return upon the showing that you say the company did make?

Mr. LANGHORNE: Yes.

Mr. Justice McKENNA: They claim three per cent. What do you say about that?

Mr. LANGHORNE: The referee found that the income from the rates was 7.7 per cent.

Mr. Justice McKENNA: On the property which they exhibited?

Mr. LANGHORNE: Yes, sir; the property which they exhibited before the rate board and also the property which they exhibited before the circuit court, leaving out the water rates.

Mr. Justice VAN DEVANTER: Did this board have a continuing power so that they could go before the board today and represent that the water rights were omitted and should be included and the rates adjusted accordingly; or has the board the power to entertain such an application?

Mr. LANGHORNE: There is no provision in the statute for a rehearing before the board, but they may come up the next year. These rates are in force for a year. They can renew their application at the end of the year. The statute expressly provides that.

Again, in the case which counsel has referred to, *San Diego Land Company against National City*, in 174 U. S., 739, it was stated (this has reference to fixing rates in California):

"The Constitution does not contemplate any such mode of fixing rates. It is not a matter of guesswork or an arbitrary fixing of rates without reference to the rights of the water company or the public. When the constitution provides for the fixing of rates or compensation, it means reasonable rates and just compensation. To fix such rates and compensation it is the duty and within the jurisdiction of the board. To fix rates not reasonable or compensation not just is a plain violation of its duty. But the courts cannot, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing."

Again it is said:

"The board of supervisors, town council, board of trustees or other legislative body of any county, city or town are hereby authorized, and it is made their duty, at least thirty days prior to the 15th day of January of each year, to require, by ordinance or otherwise, any corporation, company or persons supplying

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water to such county, city or town, or to the inhabitants thereof, to furnish to such board or other governing body in the month of January of each year, a detailed statement, verified by the oath of the president and secretary of such corporation or company or of such person, as the case may be, showing the name of each water-rate payer, his or her place of residence, and the amount paid for water by each of such water payers during the year preceding the date of such statement, and also showing all revenue derived from all sources, and an itemized statement of expenditures made for supplying water during said time."

It was the right and duty of appellant—that is the water company—in January of each year to make a detailed statement under oath showing every fact necessary to a proper conclusion as to the rates that should be fixed by ordinance.

Mr. Justice DAY: What are you reading from?

Mr. LANGHORNE: I am reading from the case of *San Diego Land and Town Company vs. National City*. This, of course, relates to rates fixed by a municipality.

I call your Honors' attention to this case in support of the preliminary point we make here, and that is that they have no standing in a court of equity to attack these rates upon that ground. They might as well have come before that board and left out half of their property or half of their tangible physical properties and then have appealed to the Circuit Court of the United States and said that the board's order is void because confiscatory and unreasonable. If it was confiscatory and unreasonable it was not the fault of the board, but solely the fault of the water company.

There is another preliminary point to which I wish to refer your honors. This case is peculiar in another respect.

In 1871, as this record shows, the canal company made certain contracts with the firm of Miller & Lux by which, in exchange for rights of way over the land of Miller & Lux in those counties, the water company agreed to give Miller & Lux water for their lands at a certain specified rate less than those paid by other parties.

Some differences seem to have arisen between the water company and Miller & Lux, and the result was that the water company sued Miller & Lux for \$70,000 on account of unpaid water rates. At that time I think Miller & Lux owned, if any, a very small part of the capital stock of this company. While that suit was pending Miller & Lux acquired 80 per cent of the stock of this water company; they acquired control of its board of directors. What was a partnership in 1877, of Miller & Lux, is now a corporation, I believe, under that name. The president of both corporations, that is the water company and Miller & Lux, is the same individual; the vice-president is the same individual; the secretary is the same individual, and the engineer who measures the water consumed by Miller & Lux and sold to it by this canal company is also the engineer for Miller & Lux. I do not think, may it please your honors, that there could be presented any better case of interlocking directorates and officials than is presented by this canal company, the complainant in this case, and this concern of Miller & Lux.

The record also shows that for the year that these rates were under investigation, namely, for the year ending July 1, 1907, there were 113,000 acres of land irrigated by these canals. Of that land Miller & Lux irrigated, cultivated lands, 58,952 acres; of grass and pasture lands, 20,000 acres. All other consumers, other than Miller & Lux, irrigated 34,050 acres. You will see that Miller & Lux, of the entire irrigation, irrigated 69 per cent. The company actually collected \$107,409 for that irrigation, of which \$51,480 was paid by Miller & Lux and \$55,928 by other consumers. So that while Miller & Lux irrigated 69 per cent of the entire irrigation, they actually paid for less than one-half of the entire gross revenue. This, may it please your honors, was because of these discriminating contracts that were made by Miller & Lux, who owned 80 per cent of the stock and who controlled the board of directors and officials of this water company.

The claim was made in this case that these water rights that we have been hearing about were paid for to Miller & Lux by these rebates given to them by the water company. While I understood counsel in his opening argument to abandon that claim, nevertheless his brief is to the point that they amounted to something like \$450,000 which they claim they have paid, and that these rebates were really on account of water rights.

The master in chancery devoted a great portion of his report to that question. He found, and his finding is unquestionably supported by the evidence, that those rebates were not granted at all for water rights; that not one of these contracts granted this canal company any water right from Miller & Lux in consideration of any rebates.

The first contracts made provided that these rebates were on account of rights of way granted to the canal company over the lands of Miller & Lux, and in this case that has been fully covered and provided for, because the master has allowed the canal company a valuation of \$144,000 on account of these rights of way, rights of way which at the beginning were not worth over \$2.50 an acre, and yet the master has allowed them rights of way at the increased value of the land, and the land has increased in value solely because of the building of the canal. The result is that those contracts, may it please your honors, have no time limit at all. Like Tennyson's brook, they may go on forever and forever.

Counsel argues in his brief, although there is no testimony to support it, that if you add a certain per cent per year, based upon what that amounts to per year, that therefore the principal of these sums would amount to some \$450,000. That is merely an ingenious argument and assumption of counsel in this matter.

Now, then, what is the result? Both the master and the court in this case applied these rates and have charged the canal company, in estimating the income which the canal company would receive under the rates—have charged the canal company as though they had received the full amount

of the rates from Miller & Lux, bringing the total revenue which would have been received under those rates up to \$136,000. As a matter of fact the canal company failed to receive \$27,000 of that, or about 25 per cent.

I know in a number of cases in this court it has been shown that in a few instances certain rates less than the rates fixed had been given to certain consumers, and the court has held that it was proper in a case of that sort, in estimating the revenue that the company received, to figure the whole thing as though the company actually received that revenue, although it had given these rebates. But, may it please your honors, there is no such case as that presented by the record in this case. No case has come before this court where 25 per cent of the entire revenue is not collected. But not only that, here is a case where the company cannot collect it under these contracts.

So I say they have no standing in a court of equity or in a United States court to say that they are deprived of that income from these rates when they have by their own act made contracts with their controlling stockholder, putting it beyond their power to collect the rate.

As I understand, the constitutional guaranty that they could not be deprived of their property without due process of law, applies to substantive property and they must show to this court that they are materially injured; they must show that the application of these rates that they complain of actually deprives them of something—of money; but this record does not sustain that position at all. This case is a sham battle really in regard to that, because no matter what this court might hold they cannot, under these contracts, collect 25 per cent of the rate which they are attacking here as insufficient.

I respectfully submit to your honors that this case is unprecedented and is anomalous in its character; that they have no standing and should have no standing in a court of equity to complain of the rates as being confiscatory and not giving them 6 per cent, under the statute of California

upon which they rely, when they have themselves placed it beyond their power to collect 25 per cent of those rates, amounting, under those particular rates, to the sum of \$27,000.

Counsel, in his brief, which he filed yesterday or today, I suppose, criticizes us for making the claim in regard to the water rights that they paid nothing for the water rights, and that the record showed they paid nothing for the water rights, saying that we have taken the position that the matter of estimating rates should be based not upon the investment but upon the cost of reproduction less depreciation, etc.

Our answer to that is that we made the claim because they, in their brief, strenuously made the claim that they were entitled to a return upon their water rights—in other words, they made the claim that they should be valued in this proceeding because they had made those payments. They made the claim, and naturally we replied to that position. But your honors will clearly see, and it is not necessary for me to dwell upon it, because it appears with great clearness in this record that they have never paid a cent for those water rights.

Again counsel, in arguing the question of water rights, attempts to have it appear that we rest our position in regard to that matter upon the proposition that the waters of a public stream in California are public waters. It is true we have referred to that matter in our brief, but it is not an essential thing at all and our case does not depend upon that. The waters referred to in this case, which the complainant has, it never paid for and it took from the San Joaquin River without any formal acts of appropriation—that is, there is no evidence that they ever posted any notice as required by the statute of California. That, of course, is not necessary, under the laws of California, to constitute a valid appropriation. At any rate, they simply went to the river, built their dams, their head-works, and their ditches, and took the water which they wanted, and all that they wanted, without objection from any one.

It appears in many places in the record, and on page 18 of our brief we refer to the testimony of their own witness, Mr. Merritt, the secretary, who swore that for eighteen or twenty years the complainant had been taking water from the river, openly claiming the right to do so, adversely to everybody, and without asking any one's permission to do so. So that this water right which they are talking so much about, or the right to take water from the river and use it, never costs them a cent. They simply took it. Nobody objected, and their title, under the laws of California, rests upon a title by prescription. It is immaterial whether we call it "public waters," "riparian waters," or any other kind of waters. They took the water and they used it, and nobody can stop them from using it.

Mr. Justice McKENNA: Is not that a good title?

Mr. LANGHORNE: A perfectly good title.

Mr. Justice PITNEY: The master seems to put it upon the ground that, while they acquired the right as against other proprietors to take it, they acquired it not as a private right, but as a right of public distribution.

Mr. LANGHORNE: Yes; that is true.

Mr. Justice PITNEY: That they acquired it in the capacity of a public administrator.

Mr. LANGHORNE: Yes.

Mr. Justice PITNEY: And not a private right in their hands—

Mr. LANGHORNE (interrupting): Yes; that is so, may it please your honor, because the company by its articles of incorporation—it has been incorporated several times, but it has always stuck to its original articles under the old act of 1853, I think. It even went some years ago over into Nevada. The present concern is a Nevada corporation, where they could not get any water to save their lives for any purpose. They still stick to the old articles of incorporation, which show upon their face that they did not acquire these waters for any private right at all, but for the

purpose of selling and of operating a canal for a public purpose; for the purpose of selling waters to the inhabitants of these counties, and for irrigation. Their first acquirement of these waters by prescription was not for any private right at all. From the very first incorporation of this company; from the very first taking of the water from the San Joaquin River it was a public dedication by them. There was no reservation of any private right, but it was a dedication to the public for sale and distribution. This company is not a riparian owner and has no rights as a riparian owner.

Mr. Justice VAN DEVANTER: What is it that they sell?

Mr. LANGHORNE: Under the law they sell water, at least that is the way our constitution provides, that rates can be made under which they can sell water.

Mr. Justice PITNEY: They sell water service? Not water in bottles, but water service.

Mr. LANGHORNE: Yes; for irrigation. This company is almost entirely an irrigation company. I do not think it serves any households for domestic purposes. They do sell some water to water companies in some of the towns on the lines of the canals, but these sub-companies sell it to the inhabitants, and, so far as the record in this case is concerned, it is an irrigation company.

Now, with reference to the case which counsel has referred to and in which he has so much confidence. I refer to the case which he says has not been reported, but is contained in his brief.

The question in this case of *Palmer against the Railroad Commission of the State of California* was this: When this company filed its notice of appropriation it designated certain places at which the water was to be used. After it got the water it changed the places of the use of the water because it did not have enough water—in other words, it confined the use of the water to a certain district. After that was done the people living in these other places that had been designated in the notice of appropriation came before



the Railroad Commission, and finally the case came before the Supreme Court of California. They claimed that inasmuch as this water company, in its notice of appropriation, had designated these places they were bound to serve them, and they took the position that the waters that had been appropriated by this company were public waters, and so on. In the course of its decision the court decided that, notwithstanding the fact that they had named these places, nevertheless they had the right to subsequently confine the water—if they did not have enough water—to another district. That was all that was decided in that case.

Mr. Justice HUGHES: What is this water right that is spoken of? Is it just the water as distinguished from all the works that are used in the distribution?

Mr. LANGHORNE: The water right, as we understand it, is a right to use the water.

Mr. Justice HUGHES: I mean the water right that is sought to be valued here as a part of the property. What is that right, precisely?

Mr. LANGHORNE: That is the right to use the water on the land. I am coming to that, may it please your honor.

Mr. Justice DAY: What do you do? Do you build canals to the river?

Mr. LANGHORNE: We put in a dam in the river and turn the water into a canal. Then we carry that water away from the river onto lands——

Mr. Justice HUGHES: You mean it is the right to take a certain quantity of water from a certain point?

Mr. LANGHORNE: To take a certain quantity of water from a certain point and use it on the land.

Mr. Justice VAN DEVANTER: And in this case to sell it to others to use?

Mr. LANGHORNE: Yes. If a private individual takes water to be used, either as a proprietor or to sell to the public, he is only entitled to take the water that he can use. The right of diversion from the river is dependent upon the beneficial use to which the water can be put.

Mr. Justice DAY: You put a dam in the river to store a certain portion of the water and then you have a distributing system by which you carry it over the land?

Mr. LANGHORNE: Yes. You can take no more water out of the river than you can beneficially use. For instance, you cannot dam the whole river and claim that you own all of that water in the river, unless you could use the water either upon your own land or sell it to some one else. You cannot just store it there. There has got to be a beneficial use of the water.

The CHIEF JUSTICE: In that sense the water right, or your power to take the water, is not confined to water for your own beneficial use, but you take it in view of the fact that you intend to distribute it to other people for their beneficial use.

Mr. LANGHORNE: Yes. A water right, as we understand it, is really a right to use the water. In other words, there is no water right unless it has reference to this beneficial use upon the land or for household or domestic purposes.

Counsel, in arguing this question in regard to this water right, outside of the question as to whether they paid anything for it—and the record shows that they paid nothing—

Mr. Justice DAY (interposing): The law regulates the amount that you can take?

Mr. LANGHORNE: Yes; the law practically regulates that.

Mr. Justice McKENNA: You say that they paid nothing. You also say that they have a title by prescription. That is a good title?

Mr. LANGHORNE: Yes.

Mr. Justice McKENNA: If a man should get a piece of land by prescription, could it be taken away from him because he paid nothing for it?

Mr. LANGHORNE: Probably not; but water stands on a different basis in California than other property in that respect.

Mr. Justice McKENNA: My statement was addressed to your observation that they had paid nothing for it, and yet have title to it by prescription——

Mr. LANGHORNE: Yes, that is true.

Mr. Justice McKENNA: I do not understand that.

Mr. LANGHORNE: One of the arguments in this case which we attempted to meet was that the water right should have been valued in this proceeding as a basis for fixing rates, because they had paid for it.

The CHIEF JUSTICE: You said they never took the water at all in the sense of becoming the owner of it.

Mr. LANGHORNE: No.

The CHIEF JUSTICE: That they simply had the right to take the water upon the condition that they would apply it to a beneficial use.

Mr. LANGHORNE: Yes.

The CHIEF JUSTICE: They had the water, but it was not theirs; it was coupled with a limitation.

Mr. LANGHORNE: Yes.

The CHIEF JUSTICE: Which limitation prevented them from ever having title, but simply giving them the power to use it?

Mr. LANGHORNE: Yes.

The CHIEF JUSTICE: And if you paid them for that you paid them for a thing that they did not own?

Mr. LANGHORNE: Yes. In regard to this point, counsel has referred to a good many decisions as though this question had been decided by the Supreme Court of California.

Mr. Justice DAY: Would not the right to take the water and make that use of it be a property right and a valuable right?

Mr. LANGHORNE: It would be if a private individual should take it, but not for a water company, after it is dedicated to the public use. That is the distinction.

Mr. Justice HUGHES: Your contention is that they had no water right whatever except the right to distribute the water? In other words, that they did not use it for a ben-

eficial use themselves, but acted as a carrier and distributor of it and their right was a distributing right.

Mr. LANGHORNE: That is practically what it is; yes.

Counsel has referred to a number of cases in the States of California and Idaho as though those cases had decided this point. None of those cases has ever passed upon this point; not one of them. This question which is presented here before this court has never been before the Supreme Court of the State of California. The only case that has been decided is the case referred to by counsel, decided by Judge Ross, which is on my brief, and in that case Judge Ross squarely held that they were not entitled to charge—that is, the water company was not entitled to charge for a water right, because he said they had undertaken to dedicate the waters to a public use; that they themselves assumed that position, and no authority can anywhere be found for any charge for the so-called ‘water right.’ The State permitted the water in question to be appropriated for distribution and sale for purposes of irrigation, and for domestic and other beneficial uses, conferring upon the appropriator the great powers mentioned, and compensating it for its outlay by the fixed annual rates.

“The complainant was not obliged to avail itself of the offer of the State, but, choosing, as it did, to accept the benefits conferred by the constitution and laws of California, it accepted them charged with the corresponding burden. Appropriating, as it did, the water in question for distribution and sale, it thereupon became, according to the express declaration of the constitution, charged with a public use.”

I am reading from page 44 of my brief.

If they could not do that; if they could not charge it as a rate, they cannot do it indirectly, as they are attempting to do in this case, by having it valued as a part of their plant. That is what the court and master held in this case.

That is really the only decision anywhere to be found that approaches or might be said to bear directly upon the question.

When that case came to this court, it is reported in the 174th U. S., page 739, Mr. Justice Harlan delivered the opinion in the case, and said:

"One of the questions pressed upon our consideration is whether the ordinance of the city should have expressly allowed the appellant to charge for what is called a 'water right.' That right, as defined by appellant's counsel, is one 'to the continued and perpetual use of the water upon the land to which it has been once supplied upon payment of rates therefor established by the company.' In the opinion of the circuit court it is said that 'no authority can anywhere be found for any charge for the so-called water right.' This view is controverted by appellant, and cases are cited which, it is contended, show that the broad declaration of the circuit court cannot be sustained."

(Cases are then cited.)

"We are of opinion that it is not necessary to the determination of the present case that this question should be decided. We are dealing here with an ordinance fixing rates of compensation to be collected within a given year for the use of water supplied to a city and its inhabitants or to any corporation, company or person doing business or using water within the limits of that city. In our judgment, the defendant correctly says in its answer that the laws of the State have not conferred upon it or its board of trustees power to prescribe by ordinance or otherwise that the purchase and payment for so-called 'water rights' should be a condition to the exercise of the right of consumers to use any water appropriated for irrigation or affected with a public use."

Counsel says that that case has been overruled by the Supreme Court of California and subsequently by the United States Circuit Court of Appeals in a number of cases. Counsel makes the same claim in his brief. We have in our brief answered that, may it please your Honors, by showing that the decision of Judge Ross was not involved at all in these

other cases referred to by counsel. The cases referred to by counsel, notably the case of the Fresno Canal Company against Park, 129 California, were not cases in which the question was presented as to whether or not a water right should be valued or charged for in that way. Those cases present simply the question of whether or not, in the absence of a rate fixed by the board of supervisors, the water company and the irrigator could make a contract about the rate to be paid. That was all that was involved in those cases. This question was not decided at all in any of them, and was not presented in any of them.

The Supreme Court of California, in a number of late cases, however, has practically adopted the law of Colorado, you might say, in regard to these water companies supplying the public. Under the constitution of Colorado all of the waters in the State are public waters, and there are no such things as riparian rights.

Mr. Justice VAN DEVANTER: Are the water rights public, too?

Mr. LANGHORNE: Apparently so.

Mr. Justice VAN DEVANTER: What decisions do you refer to in Colorado?

Mr. LANGHORNE: They are referred to in the court's decision and also in the brief, where they seem to take the position that a public water company is a public carrier of water.

Mr. Justice VAN DEVANTER: Is that all you mean in reference to that?

Mr. LANGHORNE: Yes; that is all I mean in regard to that.

Mr. Justice VAN DEVANTER: Well, a railroad company is a public carrier but it owns its railroad.

Mr. LANGHORNE: Well, but there it seems admitted that the water company has no proprietary interest in the water at all.

Mr. Justice VAN DEVANTER: No proprietary interest in the water?

Mr. LANGHORNE: In the water, yes, or in its use. It only has the right to appropriate it for the purpose of carrying it to other people—that is, to the public—to be used.

Mr. Justice VAN DEVANTER: Do they hold that it is not a proprietary interest? I do not mean in any specific water, but do they hold that it is not a private right?

Mr. LANGHORNE: Well, they practically hold that.

Mr. Justice VAN DEVANTER: Will you not indicate one of the decisions which says that? If it is just an inference that you are drawing you need not dwell upon it.

Mr. LANGHORNE: I will refer your Honor to it when I come to the decision of the circuit court.

In a late case decided by the Supreme Court of California, the case of *Leavitt vs. Lassen Irrigation Company*, in 157th California, the plaintiff had been the owner of an irrigation system under his private right first, apparently. Then he dedicated the waters to the public and commenced selling them and distributing them to the public. Then, after he sold the water company, he attempted to maintain that he had acquired a private right to a portion of those waters. The Supreme Court of California said:

"Treating Leavitt's appropriation as being wholly and entirely for public use, he, the owner of the system, was but an instrumentality for the distribution of the waters which he gathered to such members of the public as might apply for them and pay to him the legal charge for the service that he rendered. As the agent of such a public use, he had no power whatsoever to reserve for himself for his private purposes any part of this water. If he could reserve a part he could reserve all, and thus, by his *ipse dixit*, convert a public use into private ownership, or, if he could reserve a part for himself, he could with equal authority give away parts of the supply to others, and by this method destroy what the constitution itself has declared shall forever remain a public use."

Again, in the very case referred to by counsel, is the decision which he has set forth in his brief, the *Tyndale Palmer* case, it is said:

"It follows that they remain private property when they pass the purchasers, and that when they pass from the riparian owner to others by prescription, grant or consent, they do not by that transfer become impressed with any public use and it still remains true that there must be a dedication to public use to divest the private right."

There is a recognition in the very last decision by the Supreme Court of California that after a dedication of these waters to public use all private rights in them cease.

Now, if your Honors please, there is absolutely no difference between the law of California and the law of Colorado in regard to this matter—after the waters have been dedicated to a public use in California—absolutely none. Here is a case which counsel has printed in his last brief filed, which makes that distinction: That it remains private property up to the time of dedication, and after it has been dedicated it then becomes public property and there can be no private right in it.

Mr. Justice PITNEY: As I understand the dedication that this company has done is to freely distribute this water for irrigation purposes at a price of so much per acre.

Mr. LANGHORNE: Yes.

Mr. Justice PITNEY: And that is done subject to the regulation of the supervisors?

Mr. LANGHORNE: Yes.

Mr. Justice PITNEY: Is it dedicated in any other sense except that it is dedicated subject to receiving compensation for its enjoyment?

Mr. LANGHORNE: The State allowed it to charge rates in consideration of the dedication.

Mr. Justice PITNEY: The question is whether, in charging the rate, you are not counting as a part of the capital the right to get the water out of the river and distribute it in this fashion.

Mr. LANGHORNE: Yes.



Mr. Justice PITNEY: And if so, how much is it worth?

Mr. LANGHORNE: That point is fully covered by the decision of the judge of the circuit court. Judge Morrow places it upon this ground:

"In these cases the theory that the irrigation company is an intermediate agency in the execution of a public trust is necessarily based upon the doctrine that the right to appropriated water is attached to the land. The company cannot at the same time be principal and agent. It cannot own the water or the right to appropriate and sell it, and at the same time be the agent of the public in appropriating it for a public use. The logical relationship of such a company to its appropriated water is that of agent of the owner of the land in diverting and bringing the water to the land for which it has been appropriated. But it is immaterial whether the company is deemed to be the agent of the public in diverting and carrying the water owned by the public to the consumer who owns the right to its beneficial use, or the agent of the consumer in diverting and carrying the water to his principal for a beneficial use. In either case, while the carrier is entitled to be paid for his services as a carrier a reasonable compensation under such regulations as the law may prescribe, he is not the owner of the water carried or the water right created by its diversion, and he cannot compel the consumer to purchase it, and to pay for its use, either in the way of an annual or other rate upon its supposed value as a property right. One of the methods suggested by the complainant for estimating the value of its alleged water right was upon the basis that the value of the right to have water to irrigate land may be measured by the excess of the value of the land with such a right over that which it possessed without such a right, less the expense incurred by the land-owner and the canal company in introducing the irrigating system. By this method the following estimate was obtained: The value of the land without water was \$855,312. To bring the land under irrigation, the land-owners had constructed lateral ditches costing \$162,000, making a total of \$1,017,312 as the

investment of the land-owners. The complainant's irrigation works cost \$1,042,940.05, making a combined expenditure on the part of the land-owners and complainant of \$2,060,252.05. The value of the land with water was estimated at \$4,122,210. Deducting from this amount the combined expenditure of \$2,060,252.05, and we have as the value of the water upon the land the sum of \$2,061,957.95. This sum divided in half would be \$1,030,978.97, which would represent the increased value of the land upon the land-owners' investment, and also the increased value upon the canal-owner's investment—that is to say, the sum of \$1,030,978.97 for each—and accordingly this sum is claimed by the complainant as the value of its water right. This method of working out a water right for the complainant and fixing its value is plausible, but not sound. It assumes that the irrigation company has obtained a partnership interest in the land irrigated, when none has been secured by contract or provided by law. As well might a railroad company in estimating the value of its property for rate purposes add to the value of its railroad property the valuation for a share or interest in the increased value of the land through which the railroad has been built, and to the owners of which it distributes merchandise as a carrier. This method of valuation of a water right discloses, however, its real basis and character; to be of substance and value it must be attached to the land”—

It has absolutely no value at all unless it is applied to the land, and therefore the judge says:

“This method of valuation of a water right discloses, however, its real basis and character; to be of substance and value it must be attached to the land and be a part and parcel of that interest. What Mr. Justice Henshaw said in the *Leavitt* case with respect to a private right of service from the carrier is equally applicable to such a water right: ‘If by any method, however devious, there can be carved out of this public trust such a private right, it must obviously result in the destruction of the public use itself.’

This theory of the relation of the carrier to the water right as an intermediate agent is in accord with the law of beneficial use prevailing in all the western States where the right of appropriation is derived from act Cong. July 26, 1866, c. 264, 14 Stat., 251, and is there limited to some useful or beneficial purpose. As said by Mr. Justice Field in *Atchison vs. Peterson*, 20 Wall., 514 (22 L. Ed., 414): 'The right to water by appropriation is limited in every case in quantity and quality by the uses for which the appropriation is made.' This was said with respect to the use of water for mining purposes, but in the subsequent case of *Basey vs. Gallagher*, 20 Wall., 682; 22 L. Ed., 452, the court held that the views and rulings made in the case of *Atchison vs. Peterson* 'are equally applicable to the use of water on the public lands for the purposes of irrigation.' To the same effect is the desert land act (act, March 3, 1877, c. 107, 19 Stat., 377) (U. S. Comp. St., 1901, p. 1548), where it is provided that the right to the use of water on desert land 'shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation.' The Civil Code of California provides in section 1411, with respect to water rights acquired by appropriation. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases.' Section 8, act Cong. June 17, 1902, c. 1093, 32 Stat., 390 (U. S. Comp. St. Supp., 1909, p. 600), commonly called the 'Irrigation Act,' provides that: 'The right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis and measure and limit of the right.' The same provision has been incorporated into the laws of most of the western States, not, however, as new legislation, but as the established definition of a water right under the acts of Congress and the constitutional provisions of the States declaring that the use of appropriated water is a public use. The right of diversion is accordingly limited to the beneficial use made by the consumer. *Anderson vs. Bassman* (C. C.), 140

Fed., 14; Wiel on Water Rights in the Western States (3d ed.), sec. 478. The complainant in this case claims to have acquired by prescription against all riparian owners and by appropriation against the world the right to divert from the San Joaquin River the quantity of water which the evidence shows it has diverted into and through its canals for more than five years, to wit, 1,350 cubic feet of water per second. The claim, as stated, is manifestly not sufficient to state a right of diversion. It must appear, further, that the complainant is either the owner of land for which the water is being appropriated for a beneficial use, or that the water is being diverted for the purpose of being carried by the complainant to consumers who own land for which the water is being appropriated for a beneficial use, and that the water is being so used. The complainant in this case is not the owner of any land for which the water is being appropriated. The complainant's right to divert the water of the river is therefore based upon and is measured and limited by the beneficial use of certain consumers for which the water is being appropriated. But, if the amount required by these consumers for a beneficial use is not 1,350 cubic feet of water per second, then complainant has no right to divert that **quantity of water**; or if, for example, these consumers require only 100 cubic feet per second for beneficial use, then that would be the basis and measure and limit of complainant's right to divert water from the river, and not the capacity of complainant's head-works, canals, and ditches used in making such diversion. The water right must, therefore, be the right of the consumer and attached to his land, and not the right of the complainant attached to its canal system. It follows that, under the law of this State, it cannot be valued as a property-right upon which the complainant is entitled to an income from the water rate to be paid by the consumer."

That is the basis of the judge's opinion in this case upon the question as most strongly presented by the record.

I submit the case.

**REPLY ARGUMENT OF MR. EDWARD F. TREADWELL  
ON BEHALF OF APPELLANT.**

MR. TREADWELL: May it please your honors, there are only one or two matters that I care to reply to, because we feel that the matters of most importance have been very thoroughly argued, both orally and in the briefs.

I would like to say just one word to the court in regard to the suggestion that is made by counsel that for the reason, as he claims, that we did not claim the water rights, they should be confiscated and we should have no relief from this court or any other court in regard to them.

The facts in regard to that are these: Counsel has stated, and this court knows, that there has been previous litigation between these very same parties in regard to this general subject, not of water rights, but about rates, and the court has before it our bill of complaint filed in the original suit, between these same parties, in which the ownership of these water rights is set up and claimed by this complainant, and it is alleged in that complaint that no return was allowed upon them.

It has been distinctly held by the Supreme Court of California that the board of supervisors need give no hearing whatever in fixing these rates; that it need take no evidence whatever if it does not desire to in fixing the rates, but it acts absolutely and entirely as a legislative body, hearing whom it may see fit to hear, and hearing what it may see fit to listen to. All that this record shows is that when we filed our complaint in this case we specifically set up the ownership of these water rights and specifically alleged that no return whatever had been allowed upon them. The defendants come in and say that the board of supervisors has been so terribly misled, according to counsel, that we should be denied relief. They deny that we had these water rights and deny that they were of any value whatever. We went to trial on that subject and we tried it for many days, as this

record shows, on the question of these water rights, how they were acquired, what their value was, what the cost was, and matters of that kind. That matter was in issue, and they contended that we were not entitled to any return at all. Therefore this court must assume, if it assumes what is reasonable, that if these water rights had been shown in the proceeding before the Board of Supervisors, that the Board of Supervisors would naturally have taken the same position with regard to them that they took in their verified answer here and which they take on this appeal, from one end to the other, and that is that we would not be entitled to them, if we had set them up, or if they had appeared.

All that does appear in this case is that counsel introduced a typewritten stenographic report of certain proceedings of evidence taken before the supervisors. In other words the evidence that was taken before the board of supervisors was produced on this hearing. There is nothing shown here as to what the company claimed before the board of supervisors; there is nothing here to show what argument was made upon the facts there shown. There is nothing about the claims that were made by the company, but simply the testimony that the board of supervisors saw fit to take. Among other things, that evidence showed that the company did own canals; that it was diverting water; it showed the amount of water that it sold; the amount of money it cost to sell it, and the amount received for it. In fact, every factor, almost, was produced which would show the existence of a water right. In other words, without the right to divert the water, it would be difficult to understand how it could have water to sell—and that was the very foundation of the entire proceeding. General testimony was given as to the cost of this entire plant. It is admitted by counsel that the same witnesses came before the board of supervisors that came before the court and testified to the cost of this plant. It is admitted that the cost of the plant included an alleged cost of water right; but because, as he says, the stenographic report before the board of

supervisors does not show items—there being no cross-examination of the witnesses and the witnesses being allowed to simply give their conclusions—of the total amount of the cost of all the property, including both the water rights and the tangible property, he therefore draws the conclusion—

The CHIEF JUSTICE: What were the items included in that cost—

Mr. TREADWELL: Do you mean before the board of supervisors, your honor?

The CHIEF JUSTICE: You say, "the cost of the water right."

Mr. TREADWELL: The only cost that was included in that particular matter was the sum of \$112,000 alleged to have been paid to a man by the name of Bensley in 1871.

The CHIEF JUSTICE: Paid him for what?

Mr. TREADWELL: For water rights, etc.

The CHIEF JUSTICE: He could only, under the California law, as I understand it, have taken the water out for a beneficial use. If he had the right to take that water out, or had acquired the right to take the water for a beneficial use and you paid him to give up that right which he had and turn it over to you, of course you might call that the cost of the water; but it was not. It was the cost of buying the privilege to get that water which somebody else had appropriated for a beneficial use. Is that what you mean by paying \$112,000 for the water right?

Mr. TREADWELL: I want to say candidly to your honor that I am not arguing at the present time to show that we paid anything for the water right.

The CHIEF JUSTICE: Then I misunderstood you.

Mr. TREADWELL: I simply want to show that in the proceedings before the board of supervisors that we put in just as much evidence in regard to the structures as we did in regard to the water right and just as much evidence in regard to the water right as we did in regard to the structures.

Mr. Justice LAMAR: Do you make a distinction between the water that you sell by the gallon or by the acre as a

commodity, and the right to take that water out of the river?

Mr. TREADWELL: The right that we claim, your honor, as a water right, is the right to divert water from the river. That is the right we claim as being a thing of value. As to how we acquired that, your honor will note by Judge Morrow's opinion, that he thought we simply went out and appropriated it. But the vice of that is that you cannot acquire anything in the way of water by mere appropriation in the State of California. You have got to either acquire it by purchase from the riparian owner or by extinguishing his rights by prescription. When you do once acquire it, whether it is by prescription or by contract, then it is a right of property, and that is the water right that we are talking about.

Mr. Justice DAY: What was the right of the riparian owner?

Mr. TREADWELL: The right of the riparian owner, if the court please, in this particular stream has been adjudged to be the right to have all the water of that river flow unrestrained in any way, shape or form, past his property, and it has been held by the Supreme Court of the State of California, within the last three months, that no one can appropriate a drop of that water in the San Joaquin River as against the protest of a riparian owner. It has been held within the last three months that a canal company, which took out its canal a few miles above this company and attempted to appropriate and divert the water, as against some riparian owners, could be enjoined from taking any water whatever.

The CHIEF JUSTICE: There is some case in this court, the title of which I do not recollect—it has been here since I have been here—where there is this situation. If I am not mistaken, the beneficial-ownership principle applied there. They cut their canals and took out water. There were four or five canals. Canal A was established prior to the other canals. Canal A was cut through to take so many inches of water,



and Canal B and Canal C were also cut through. After that had gone along for some time and they wanted to take out water, some controversy arose, and my recollection is that the water gauger, appointed under the State law, went along that river and he said to Canal A, "Look here; you have a canal here big enough to take out a thousand inches, and while you are away ahead of these people, you are not devoting this water to a beneficial use. You are only devoting 60 inches to a beneficial use"—or 40 inches, whichever it was—"and I am going to reduce the water that you take out to that which you can use for a beneficial use." If it was recognized that there wasn't any ownership in the water, how could they take the ownership away? They took it away from him on the ground that he only had what they would call a servitude.

Mr. TREADWELL: I understand your Honor's suggestion very clearly.

The CHIEF JUSTICE: I do not know what case that is.

Mr. TREADWELL: I do not remember the case, but it is unnecessary, because what your Honor states is an elementary proposition.

Mr. Justice VAN DEVANTER: That is a part of every water right. You only have the right to take the water out for a beneficial use and only so long as you use it that way.

Mr. TREADWELL: Exactly. We are talking about the right by appropriation, the right between appropriators. In the case your Honor mentions they were claiming by appropriation, and one of the conditions of appropriation under any law is that it must be for a beneficial use. It cannot exceed a reasonable amount necessary for that beneficial use. But it does not make any difference whether a man used it for himself or whether he had somebody else to use it. It is a beneficial use in either case, and he must within a reasonable time see that it is applied to that beneficial use.

The CHIEF JUSTICE: These were distributing canals.

Mr. TREADWELL: I understand, your Honor. But in the case of a public-service company it is held even when the

claim is by appropriation entirely and nothing else that they have a reasonable time, which may be as much as five years, in which to finally apply the water to a beneficial use, and to find out the measure of their right, but the title is always in one place and it is subject to a condition either precedent or subsequent. If they do not apply it to a beneficial use they will never get title completed, or they will lose title if it is completed. When you do put it to a beneficial use the title is then completed, and it relates back to the original appropriation. But whether that has any application here or not is not very important, because I do not want you to overlook the fact that this was not a case where you could simply go to the stream, where you had been invited, so to speak, by the State, to go and help yourself, either for your own use or the use of the public, but this is in a State where the State has said through the highest court that you cannot go to the stream and you cannot take a drop of water until you acquire it by some other method than the right of mere appropriation.

Mr. Justice LAMAR: As between two appropriators, when one person unlawfully takes the water that belongs to another, what is the property damage? How is that valued when one takes water that belongs to another?

Mr. TREADWELL: That is, when one appropriator takes water belonging to another appropriator?

Mr. Justice LAMAR: Yes.

Mr. TREADWELL: Of course if he simply took it temporarily and it was simply a suit for the damage that had been caused, why, of course it would only be the actual damage through the loss of a crop, or something of that kind. But if it was permanently taken—and that is probably what your Honor has more reference to—for instance, by condemnation, in those cases they do hold that the value is to be fixed by the difference in the value of the land with the water and the value of the land without it. It is true that that is done. But I want your Honors, because this point Judge

Lamar has suggested is important, to be careful in considering this case to entirely separate the question as to how you are to prove the value of this water right from the question of its existence and the right to a return upon it. I want to say that how a particular right would be proved, that is, how the particular value of it will be proved in any given case, especially where the water is owned by a company which is limited to the right to sell it and collect the rate, is often a difficult question. But happily that question is eliminated in this case because the court has found the value and we are not concerned with the method it took to arrive at the finding of that value. So I would say that there may be an entirely different property right, which has a separate value, and that is the right of a consumer to receive the water on his own land. That may be of value. I am not saying it is not, because it is not in this case. Possibly our water right is not as valuable as if we absolutely owned this property and could do anything with it that we saw fit. That does not militate against the proposition that it is property and property the value of which the court has found.

There is one other contention that counsel makes, and it is substantially this: That the record here shows that under the law we could not take this water without first settling with the riparian owners. The record shows that we in fact did settle with the riparian owners by saying: "Here, instead of paying you a flat sum for the right to take this water, we will take it and give you certain concessions hereafter in regard to your rates or in regard to other things." Counsel says that because we have done that——

Mr. LANGHORNE: I did not say that.

Mr. TREADWELL: I say in effect counsel says we have done that, because hereafter when we furnish the water we will have to make these concessions to these men. He says that because we cannot actually get the money into our own pockets and then pay it back to them that we should be denied any relief at all in the courts. In other words, he

says that because we cannot get 25 per cent of this return, because we have already contracted that away, that the court will also take away the 75 per cent that we would receive from other people.

I do not suppose this court would hesitate for a moment to say that a canal company could go out and say to the riparian owner, "We will give you so much money every month in payment for the right that we get," and when it comes around we collect the full rate and then pay them that amount. The court, of course, in passing on those rates, would consider that we got the whole rate, and the matter would be stopped right there. That is what the court did in this case. To say that the court would not give us any relief against a confiscatory ordinance, which is admitted to be confiscatory, simply because we have got to live up to our private contracts is beyond the decision of any court and is not based in either reason or law.

As to the matter of payment for these water rights, I must say that even after listening to counsel's argument it is difficult to understand what counsel's position on that is. He admits in one breath, as I understand his argument, that the fact that we did not pay for these water rights is an entirely immaterial factor. Of course, it must be, because, if we acquired them by prescription, that is just as good a way of getting title as any other, and whether we did pay for them or not seems to be entirely immaterial. But the *master* before whom this case was tried held if we had paid for the water rights we would have been entitled to recover a return on them. The *court*, however, entirely disregarded the master on that, and, of course, it had to, because this court had held time and again that what you pay for a thing is an entirely immaterial factor—in fact, it so held in our own appeal in this previous case that it was not a controlling factor—so the court, in rendering the final judgment, said that it was entirely immaterial whether we had paid for them or had not, and that is the attitude counsel necessarily takes in this case.

Counsel states that California, in the last few years, has adopted the Colorado theory of water rights. That seems to me to be a pretty extraordinary statement to make to this court, in view of the fact that in the *Palmer case* the court specifically called attention to the difference between the law of Colorado and the law of California on this subject.

Counsel has argued that the Supreme Court of California has abandoned all of its decisions on this subject and gone back and adopted the Colorado cases. Notwithstanding that, I have cited a case here, decided within three weeks, I think, where the court specifically said that the Colorado cases did not apply to California. All he refers to in support of that is what is known as the *Leavitt case*.<sup>16</sup> All that was held in the *Leavitt case* was that a man who had dedicated the water to a public use could not go and carve out of it a private right and say he owned that absolutely as against the public to which he had dedicated it. That is a proposition, your Honors, that no one disputes in any way, shape, or manner.

Then he goes on and says that the *Palmer case* shows that there still must be "a dedication" in order to divest the private right. There are two kinds of dedication. One dedication is where you absolutely give a right to the public and in giving it you do not want any compensation and do not ask for any. That is an absolute dedication in the most extreme sense. The other method of dedication is when you impress a thing with a public use on the condition that you are to get a return on it in the way of a rate. The first method is a mere benevolence. The one we are dealing with here is not an absolute dedication in the nature of an absolute gift, but it is a dedication coupled with a condition that you will get a due return, because that is what we started in business for in the first place.

There is one final thing in this case to which I desire to briefly refer: Counsel refers to the fact, as did Judge Morrow, that the Civil Code of California provides for the appropriation of water. Now I have shown to your Honors not only

<sup>16</sup> *Leavitt vs. Lassen Irr. Co.*, 157 Cal., 82.

that the sections of the Civil Code which counsel referred to provided for appropriation of water, but a couple of years ago the legislature went to work and amended these sections of the Code by putting in the declaration that the waters of the State of California were public waters of the State. That was in 1911.

On the petition for rehearing in the *Palmer case*, which I have read to your Honors, those Code provisions were called to the attention of the Supreme Court of California, and the Supreme Court of California said that those provisions of the Code had no effect whatever; that the added provision to the Code by amendment that these were public waters of the State was a declaration by the State which it had absolutely no power to make, so far as concerned rights already vested in people who had acquired rights against the riparian owners by prescription; that those were private rights and that they were in private ownership; that the declaration of the State made in the year 1911 that these were public rights and public waters came too late to have any effect whatever. That particular case in which that decision was made was a case of a public-service corporation where the water had been dedicated to, as counsel says, or impressed with, as I say, a public use.

I thank your Honors.

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No. 303

Office Supreme Court, U. S.  
FILED  
MAR 17 1914

JAMES D. MAHER  
CLERK

# In the Supreme Court

OF THE  
United States

OCTOBER TERM, 1913.

THE SAN JOAQUIN AND KINGS RIVER CANAL  
AND IRRIGATION COMPANY INCORPORATED  
(a corporation),

*Appellant,*

vs.

COUNTY OF STANISLAUS of the State of Cali-  
fornia et al.,

*Appellees.*

## APPELLANT'S REPLY BRIEF.

GARRET W. McENERNEY,  
FRANK H. SHORT,  
EDWARD F. TREADWELL,  
*Solicitors for Appellant.*

Filed this.....day of March, 1914.

JAMES D. MAHER, *Clerk.*

By.....*Deputy Clerk.*

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*Appellees.*

No. 303

### APPELLANT'S REPLY BRIEF.

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#### Preliminary Statement.

In replying to the brief for appellees herein we shall make no attempt to reargue the principal matters presented in our opening brief, nor will it be necessary to in any way analyze the cases relied upon by appellees, as most, if not all, of them were very fully considered by us in our opening brief. There are, however, some matters of general importance contained in

appellees' brief to which specific reply will be made. Before doing so in detail, we would respectfully submit that in some regards appellees' brief is somewhat disappointing and that it tends to cloud the issues on this appeal by going into matters decided in favor of appellees and which, for the purpose of this appeal, appellant has not questioned in this court, but, for the purpose of appeal, has considered as being properly disposed of by the trial court. For instance, we have conceded that if, under any contract Miller & Lux receives water from the canal company at a price less than the established rate, the canal company must be considered to have received the full rate in determining the validity of the ordinance. In the same way, we have conceded that whether Miller & Lux properly received water for its wild, uncultivated lands under the contract of 1871 and 1872, or whether it improperly received it, the action of the court in charging the canal company with the receipt of the value thereof was proper. We have also, in our opening brief, conceded that, so far as this appeal is concerned, we would not question the correctness of the decision of the lower court in charging the canal company with the receipt of some thirteen thousand dollars with which the lower court charged it, although we have always felt that the canal company should not have been charged with the receipt of that money. In view of these concessions, clearly made in our opening brief, it is difficult for us to see the propriety of reiterating and rearguing the correctness of the

decision in these regards. It is admitted by appellees that even after charging the canal company with the receipt of all of these moneys, and even upon the reduced valuation of the property as fixed by the court, and upon the reduced cost of maintenance fixed by the court, these rates only provide an annual net return of 6.66 per cent and that if the appellant were allowed a return upon the value of the water right as fixed by the trial court the rates would only allow an annual net return of 3.65 per cent. Under these circumstances it is clear that, conceding, as we have in our opening brief, all of the contentions of counsel on the points mentioned, if we are right in any of the material points relied upon in our brief, the rates are admittedly confiscatory.

It certainly would be a peculiar situation if we were deprived of a decision on that question for the reason that in the lower court we contended with great earnestness that we were being improperly charged with additional receipts and being improperly deprived of credit for additional expenditures. We trust, however, that we have stated our position, both here and in our opening brief, with sufficient clearness to show to the court that these matters are entirely immaterial to this appeal.

With this general statement we will now proceed to briefly reply to matters contained in appellees' brief which are of importance on the points actually involved on this appeal.

## I.

**APPELLEES' CONTENTION THAT THE COMPANY IS ONLY ENTITLED TO A RETURN ON ITS INVESTMENT AND NOT UPON THE PRESENT VALUE OF ITS PROPERTY IS CONTRARY TO THEIR POSITION IN THE FORMER CASE BETWEEN THE SAME PARTIES, AND IS CONTRARY TO THE UNIFORM DECISIONS OF THIS COURT SINCE THAT TIME.**

Prior to the former case between these parties (*San Joaquin & Kings River Canal & Irrigation Company v. Stanislaus County*, 192 U. S. 201; 24 Sup. Ct., 241; 48 L. ed. 406) there had been no considerable discussion as to the exact basis upon which a company was entitled to a return in such cases. Prior to that time, however, the Supreme Court of California had given careful consideration to the matter in the case of *San Diego Water Co. v. San Diego*, 118 Cal. 556. In that case the court was divided, but the principal opinion was written by Mr. Justice Van Fleet (now United States District Judge, Northern District of California), and was concurred in by Mr. Justice Henshaw and Mr. Justice McFarland, and in that opinion the view was taken, as stated in the syllabus that:

“The state has in effect appropriated the water and plant of the water company to public use and is bound to provide a just compensation for that use, to be ascertained, not upon the basis of the market value of the property, nor upon what it would cost to replace it, but upon the basis of the revenue that the *money* reasonably and properly expended in the construction of the works, actually in use, is capable of producing.”

The theory underlying this contention was thus stated in the opinion:

“They have expended their *money* for the benefit of others and subjected it to the control of others. That *money* has, in effect, been taken by the public; and the public, while refusing to return that *money* can not be heard to say that it no longer has not use for all of it.”

The majority of the court, however, consisting of Garoutte, J., Temple, J., Harrison, J., and Beatty, C. J., took the contrary position stated in the syllabus as follows:

“In the fixing of water rates the valuation of the plant is the basic element upon which the investigation rests; and the original cost of construction is simply an element to be considered in fixing the present valuation and the municipality must fix a fair and just rate for the water based upon the actual value of the plant.”

This decision was rendered in 1897 and in the former case between these parties the canal company contended for the position taken by Mr. Justice Van Fleet in that case, namely: that it was entitled to a return upon its investment and not merely a return upon the present value of its property, and both in the lower court and in this court it strongly urged that position, relying particularly on the decision of Mr. Justice Van Fleet above referred to. Its position in that regard is set forth fully in its brief in that case in this court which is thus epitomized by the reporter:



"Rates should be fixed as to allow a reasonable income on the money actually expended in construction, unless the amount of money was extravagantly or unnecessarily or fraudulently expended" (192 U. S., p. 205).

On the other hand, the Board of Supervisors in that case took the contrary position, holding that the present value of the property was the proper basis and that position is thus summarized by the court reporter of this court:

"While the cost of the works is an element to be considered, yet it is not the basic or chief element. The value of the property used and useful and the service rendered constitute the basis of valuation in arriving at the rates" (192 U. S., p. 205).

The reason for the position taken by the company in that regard is not difficult of ascertainment, for the canals and works were constructed at a time and under circumstances when they necessarily cost much more to construct than they would at the present time, and the actual cost of construction was \$1,042,940.05 (Complainant's Exhibit No. 15, pp. 1107-1109), and this did not include \$111,916.49, which the company lost in an experimental farm in order to convince the public that it was feasible to irrigate the land under the canal (p. 404), nor did it include the expense of getting water from Tulare Lake amounting to \$9,026.23 (p. 405), which had to be abandoned for the reason that the lake receded, nor did it include the loss suffered by the company during the early years of its existence before it was put on a dividend paying basis amounting to \$257,369.03 (pp. 1104-1109).

We would be lacking in candor if we did not admit that we had always felt that there was considerable merit in the view of this matter as stated by Mr. Justice Van Fleet, and as contended for by us in the former case between these parties, but we must likewise admit that when we came to trial of this case it had been firmly established by the decisions of this court that such was not the rule, but that on the contrary present value was the test, and that present value meant the present reproductive cost less depreciation. It would seem to be hardly necessary to review the authorities in support of this statement. Suffice it to say that this view was the view clearly announced by the trial court in the Willcox case, and this court gave its approval of that view in the following language:

“And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property which legally enters into the consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of such increase” (*Willcox v. Consolidated Gas Co.*, 212 U. S. 1951; 53 L. ed. 382, 399).

The same rule necessarily results from the decisions in the cases of

*Knoxville v. Knoxville Water Co.*, 212 U. S., p.

1; 53 L. ed. 371;

*Smyth v. Ames*, 169 U. S. 544, 42 L. ed. 848;

18 Sup. Ct. 418;

*Minnesota rate case*, 230 U. S. 352; 57 L. ed. 1511.

In fact it has been directly held that the company is entitled to a return on its property even if the property was *donated* to the company.

*City of Ashland v. Ashland Water Co.*, 4 Wis. R. C. Rep. 273, 306;

*Tighe v. Clinton Telephone Co.*, 3 Wis. R. C. Rep. 117, 126.

We therefore properly bowed to the rule laid down by this court and in this case proceeded on the theory clearly upheld by this court that the proper basis is the present value of the property of the company, irrespective of what it may have cost to acquire the same. This rule obviously must work both ways: If the property depreciates in value, the company must stand the loss; if it appreciates in value, it is entitled to the gain; if it was improvident in acquiring the property and paid too much therefor, it must suffer the loss; if it was enterprising and acquired the property cheaply, or for nothing, it is entitled to the consequent gain. Counsel for appellees see the necessary result of this, and in order to defeat the right of the company to any return on its valuable water rights reverse their position and contend that the entire basis of rate fixing is not the present value of the property, but the original cost or investment of the company. We quote the language of their brief on this subject as follows:

"It thus appears that complainant's alleged water rights have cost it nothing, and, so far as the record shows, all that complainant and its predecessors ever did was to divert the water from a public stream without paying any one con-

sideration for the right of such diversion. Consequently, its mere right to divert the water having cost complainant nothing, it does not represent an investment of money or other thing by complainant. Such being the case, complainant is not, we claim, entitled, in a proceeding to determine the rate it shall charge the public for the use of the water, to have the value of such alleged right of diversion included in the value of its diverting and distributing plant" (brief for appellees, pp. 26-27).

\* \* \* \* \*

"We fail to see how complainant can be injured by omitting from the valuation upon which its rates are to be estimated a water right that has cost it nothing and represents no investment by it, for the underlying reason supporting the constitutional guarantee that the rates shall be reasonable is that the rates shall give a reasonable *return upon the investment* and not a return upon something that may have cost the complainant nothing and that represents no investment" (brief for appellees, pp. 29-30).

It does appear to us that a decent regard for consistency, to say nothing of the decisions of this court, would seem to show the impropriety of the appellees making such a contention in this case. We established the present value of the water right owned by this company. The court found its present value, and assuming that there is nothing in the record showing its cost (and that is the most that appellees can claim for the record), appellees would have this court hold that the property is subject to confiscation and no return should be allowed upon it because there is no affirmative evidence of what it cost.

## II.

**THE CONTENTION OF APPELLEES THAT THE WATERS ACQUIRED BY THE CANAL COMPANY BY APPROPRIATION, PRESCRIPTION OR CONTRACT WERE "PUBLIC WATERS" IS ENTIRELY UNFOUNDED UNDER THE LAWS OF THE STATE OF CALIFORNIA.**

Counsel's principal argument against the allowance of any return upon the water rights of the company is that such waters were "the public waters of the State of California" (appellees' brief, p. 28). To use the language of their brief:

"We have said that the waters diverted from the river by complainant and its predecessors were public waters of the State of California, and this is undoubtedly so. It is provided by section 1410 of the Civil Code of California that 'the right to the use of running water flowing in a river or stream or down a canyon or ravine may be acquired by appropriation' \* \* \* The result is that the waters that a person takes from any stream in California and uses for a beneficial use for five years continuously and adversely to others are public waters of the State, which he is entitled to so appropriate and devote to a beneficial use."

We pointed out in our opening brief the fallacy of this argument in a state like California where, unlike the State of Colorado, it is held that the ownership of the water is vested in the owners of the land through which the stream flows. It would appear, however, that appellees are not the only persons who persist in this error, and for that reason, since the filing of our opening brief, the Supreme Court of California

had occasion to point out this error in affirming the decision of the Railroad Commission of the State of California, referred to in our opening brief, in the case of

*Tyndale Palmer v. Railroad Comm. of the State of California*, decided January 20, 1914, \_\_\_\_\_ Cal. \_\_\_\_\_.

That case contains one of the clearest and at the same time most concise statements of the water law of the State of California, and particularly explains the meaning and effect of the statutes of that state in regard to appropriation of water, and we would commend the case to the careful consideration of the court and will content ourselves by now quoting the following paragraphs from the opinion in that case:

“The theory that the water of a non-navigable stream in this state is in some sense ‘public water’ has been advanced before. It has been claimed that a diversion of water under the provisions of the Civil Code (secs. 1410 to 1422) constitutes a grant of the water by the state to the appropriator. The idea may have arisen from the statement sometimes made in the decisions that the riparian owner has no right in the *corpus* of the water (*Eddy v. Simpson*, 3 Cal. 252), and that running water cannot be made the subject of private ownership, that the right to use the water of a stream ‘carries no specific property in the water itself’. (*Kidd v. Laird*, 15 Cal. 179.) This is far from saying that the property in the water is vested in the public, either for general use, or as property of the state. The doctrine that it is public water, or that it belongs to the state because it is not capable of private ownership, has no support in the statutes of the state or in any decision of this court.”

\* \* \* \* \*

"The proposition that the waters of a non-navigable stream are in their nature private property and not property primarily devoted to public use is not only established by authority; it is demonstrable from well-established principles of the law of real property. The right to the waters of a stream is real property, a part of the realty of the riparian lands originally, and a part of the realty as an appurtenance to any other lands to which it may be rightfully taken when the riparian rights have been divested in favor of the user on non-riparian land. This was decided as early as *Hill v. Newman* (5 Cal. 446), where the court said: 'The right to water must be treated in this state as it has always been treated, as a right running with the land, and as a corporeal privilege bestowed upon the occupier or appropriator of the soil; and as such, has none of the characteristics of mere personalty.' (See, also, *Lux v. Haggin*, 69 Cal. 392; *Santa Paula v. Peralta*, 113 Cal. 43; *Stanislaus W. Co. v. Bachman*, 152 Cal. 725; *Shurtleff v. Kehrer*, 163 Cal. 26; *Merritt v. Los Angeles*, 162 Cal. 50; *Copeland v. Fairview etc. Co.*, 165 Cal. —, 131 Pac. 121.) Until some change is made in natural conditions, there is no existent right to the water of a stream, except that vested in the riparian owners. They alone can lawfully have access to the stream, and therefore they only, in a state of nature, may lawfully use it or divert it from the stream. Hence, the right to the water of flowing streams in this state, prior to any sale or disposition of lands by the state or by the United States, was vested in the state or in the United States, not in their respective governmental capacities as sovereign and for the common use of the people, but as riparian owners in their respective capacities as landed proprietors. These rights were and still are strictly proprietary and in their nature private. When land was disposed of by either, the riparian water right pertaining thereto passed to the purchaser as a part of that realty. It necessarily remained a private right, since the sale did not have the effect of dedicating it to public use. All these

rights belong primarily to the riparian owners, consisting of the United States, the state, and purchasers from one or the other of them. They cannot be divested from these riparian owners, and have not been divested from them, except by their consent, expressed, as by statute or by actual grant or contract, or implied, as by prescription; or by enforced taking for public use, as by condemnation. It follows that they remain private property when they pass to purchasers, and that when they pass from the riparian owner to others by prescription, grant or consent, they do not by that transfer become impressed with any public use and it still remains true that there must be a dedication to public use to divest the private right. They are no more public than is the land to which they belonged and of which they formed a part."

(In view of the fact that this opinion has not yet been officially reported, we attach the within opinion as an appendix to this brief.)

After this decision was rendered a petition for rehearing was filed in which the attention of the court was for the first time called to an amendment to section 1410 of the Civil Code, added on April 8, 1911, and providing:

"All water or the use of water within the State of California is the property of the people of the State of California;"

and it was claimed that this declaration showed that the title to the water was in the people of the state, notwithstanding the contrary declaration of the court. In disposing of this contention, the court said:

"In a petition for rehearing the plaintiffs quote the opening clause of the amendment of April 8, 1911, to section 1410 of the Civil Code. The sec-



tion formerly read as follows: 'The right to the use of running water flowing in a river or stream or down a canon or ravine may be acquired by appropriation.' By the amendment this was prefaced by the following declaration: 'All water or the use of water within the state of California is the property of the people of the state of California.' This, it is claimed, is contrary to the doctrine declared and followed in the opinion of this court herein. This section was not cited in the briefs upon which the case was submitted. We refer to it now solely in order to show that it has no application to the case. All the water rights which were in dispute in the case arose and were acquired by and under appropriations made long before the passage of the amendment aforesaid. It ought not to be necessary to remind any one that a law of this character is not retroactive, or that it cannot operate to divest rights already vested at the time it was enacted. The amendment may possibly be effective as a dedication to general public use of any riparian rights which the state, at the time it was enacted, may still have retained by virtue of its ownership of lands bordering on a stream, rights in the stream which it would in such cases have in common with owners of other abutting land. It could not affect the riparian rights of the other owners, nor the rights of any person or corporation claiming under them, nor rights previously acquired from riparian owners by prescription, nor rights acquired from the state prior to that time by appropriation under the code, in reliance upon the implied offer of the state to allow its riparian rights to be acquired in that manner, as indicated in the opinion."

This decision certainly effectually destroys the basis for the decision in the case at bar, namely: that the waters of the stream were public property and not the property of the company appropriating them.

## III.

A CANAL COMPANY ACQUIRES ITS WATER RIGHT BY EXTINGUISHING, IN TOTO OR PRO TANTO, THE RIGHTS OF THE RIPARIAN OWNERS, AND WHETHER IT ACQUIRES IT BY PRESCRIPTION, BY GRANT OR BY CONDEMNATION IT DOES NOT SUCCEED TO THE RIPARIAN RIGHT BUT EXTINGUISHES THE RIGHT OF THE RIPARIAN OWNER TO OBJECT TO THE DIVERSION, AND IN THE CASE OF A PUBLIC SERVICE COMPANY THE TACIT CONSENT OF THE RIPARIAN OWNER TO THE DIVERSION IS FOR ALL PRACTICAL PURPOSES EQUIVALENT TO A GRANT. THE CONTRACTS WITH THE RIPARIAN OWNERS WERE EQUIVALENT TO EXPRESS GRANTS.

Counsel for appellees again and again in their brief reiterate the claim that Miller & Lux did not convey to the canal company any riparian or other water rights (brief for appellees, pp. 17 and 18). They also state that:

“There is absolutely not a word in these contracts conveying or granting to the canal company the riparian rights appurtenant to any land bordering on the San Joaquin river that Miller & Lux may have owned” (p. 19).

Counsel's whole complaint seems to be that there is no contract by which Miller & Lux “agreed that the canal company should have the exclusive right to take from the river any water that Miller & Lux were entitled to have applied to the irrigation *of any of its riparian lands*” (p. 19).

Counsel seem to be of the opinion that there should have been a conveyance of the riparian rights as such, but a technical conveyance of a riparian right dis-

associated from the conveyance of the land is a legal impossibility and the Supreme Court of California has correctly stated the effect of such a conveyance in the case of

*Duckworth v. Watsonville Transportation Co.*,  
150 Cal. 525,

where it is said:

"No one can sell or convey to another that which he does not himself own. Grimmer could not by a transfer of his riparian rights sell to the plaintiff, as against third persons having interests in the water, the right to use the water upon any land, riparian or non-riparian, except his own, to which it originally attached. His deed operated to prevent him from complaining of a diversion, but it did not affect other parties. It does not appear that Grimmer had any water rights, except his right as riparian owner to the use of the water of the outlet. It follows, therefore, that Duckworth did not obtain anything by the Grimmer deed except the right to use the water of the outlet on the Grimmer land, when any water was flowing therein, and an estoppel against Grimmer to prevent complaint by him against any use of such water which Duckworth might make to the injury of the Grimmer riparian right as above defined."

It will be seen from this that a grant from a riparian owner simply amounts to an estoppel preventing him "from complaining of a diversion".

But it is held that the mere silent acquiescence of a riparian owner of a diversion for the benefit of the public has the same effect and works the same estoppel:

*Fresno etc. Co. v. Southern Pac. Co.*, 135 Cal.  
202;

*Southern Cal. Ry. Co. v. Slauson*, 138 Cal. 342;

*Katz v. Walkinshaw*, 141 Cal. 116, 136;  
*Crescent Canal Co. v. Montgomery*, 143 Cal. 248;  
*Montecito Valley Co. v. Santa Barbara*, 144 Cal.  
 578;  
*Newport v. Temescal Water Co.*, 149 Cal. 531;  
*Miller & Lux v. Madera C. & I. Co.*, 155 Cal. 59;  
*Barton v. Riverside Water Co.*, 155 Cal. 509.

Under these cases the consent of a riparian owner to the diversion prevents him from objecting thereto and leaves him entitled to recover only the damages for the diversion or the compensation agreed upon.

Keeping these facts in mind, it will be seen that even admitting that the agreements with Miller & Lux and the California Pastoral & Agricultural Company, the principal riparian owners on the stream (Trans., pp. 343-349) did not contain express grants to the canal company, they are as efficacious as if they had contained an express grant of riparian rights, or an express grant of the right of the canal company to divert the water in question, and clearly the only compensation which could have been contemplated were the benefits and advantages secured to them by those contracts. But as a matter of fact the contract of August 17, 1898 (Exhibit 11) expressly authorized the canal company to divert seven hundred and seventy-five (775) cubic feet of water per second. The contract of June 4, 1901 (Exhibit 12), expressly authorized the canal company to divert thirteen hundred and fifty (1350) cubic feet of water per second. The contract of May 18, 1899 (Exhibit 10) expressly authorized the diversion of an additional three hundred

and fifty (350) feet of water by the canal company for the outside canal, and all of the contracts contained a tacit consent to the diversion of the water by the canal company and this consent was obtained from Miller & Lux, which the evidence shows has constantly used its riparian rights to prevent the diversion of the waters of this stream (see: *Lux v. Haggin*, 69 Cal. 255; *Miller & Lux v. Enterprise Canal & Land Co.*, 142 Cal. 208; *Miller & Lux v. Madera Canal & Irrigation Co.*, 155 Cal. 59, and *Miller & Lux v. Enterprise Canal & Land Co.* [Cal.], decided December 20, 1913). These cases will show that Miller & Lux has used its riparian rights in order to protect the rights of the canal company, complainant herein, and that it could, except for this contract, have effectually used the same rights to have prevented the company from diverting any water whatever. So far therefore as the value of the rights acquired from Miller & Lux and the California Pastoral & Agricultural Company are concerned, it is immaterial whether they were acquired by grant, acquiescence or prescription, but the fact is irresistible that they were acquired by grant.

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#### IV.

#### THE DEDICATION OF PROPERTY TO A PUBLIC USE DOES NOT VEST TITLE TO THE PROPERTY IN THE PUBLIC.

We have seen that it has been expressly held that the mere appropriation of water under the statutes of the state does not dedicate the water to the public or affect the title of the appropriator. The appro-

priator is clearly the owner of the water appropriated and can not be deprived thereof without compensation, but it is equally clear that when the company does offer the same for sale, rental and distribution to the public generally this amounts to a dedication of the water to the public, but, as we have seen, not a dedication waiving compensation, but a dedication upon receiving due compensation. Such a dedication, however, does not affect the title of the property, but the company, contrary to the decision herein, still remains the owner of the property. This has been expressly decided by the Supreme Court of California since our opening brief herein in the case of *Pacific Tel. & Tel. Co. v. Eshleman* (Cal.), 137 Pac. 1119, decided December 20, 1913. In that case the court said:

“And, finally, it may not be amiss to point out that the devotion to a public use by a person or corporation of property held by them in ownership does not destroy their ownership and does not vest title to the property in the public.”

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## V.

**THE ARGUMENT THAT, IF THE WATER RIGHTS OF THE CANAL COMPANY WERE CONDEMNED, THE DAMAGES WOULD GO TO THE IRRIGATORS AND NOT TO THE CANAL COMPANY AND THAT THEREFORE THE CANAL COMPANY DOES NOT OWN THEM IS WITHOUT FOUNDATION IN LAW OR FACT.**

The legal status of these water rights is that they have been dedicated or devoted to public use upon the express agreement with the state that compensation

shall be paid the canal company therefor. The only private interests then is the right of the canal company to receive this compensation, and this, therefore, would be the only thing to be condemned in order to vest in the public an absolute ownership. To claim that the right to this compensation could be condemned without paying the value thereof *to the party entitled to receive it*, seems to be a perversion of thought.

The only case in which the irrigator would be interested would be if the public sought to take the use of the water from the portion of the public now enjoying it and devote it to the use of some other portion of the public. If we can imagine the state doing anything so stupid the question as to whether the right of the members of the public to enjoy this water is a property right which could not be taken away without compensation would become an interesting one. The latest decision on the subject would seem to indicate that it is not a property right, but merely a right as a member of the public and that the actual exercise of the right by a member of the public gives him no better right than the right of a member of the public who has not enjoyed the use (*Leavitt v. Lassen Irr. Co.*, 157 Cal. 82).

But if it be a property right it is an entirely different right from the right which the canal company owns. The canal company owns the right to divert the water from the river, to possess and protect it, and to sell it, and receive compensation therefor; the irrigator, at most, owns the right to receive the water on his land upon paying the canal company therefor.

The canal company owns the thing itself, the irrigator only a right to purchase a part of it. The interest of the canal company is a right *in* the thing, the interest of the irrigator is at most a right *to* a part of the thing. The right of the canal company is absolute, present and vested, the right of the member of the public is contingent. Without paying the price he can not enjoy the use; and he may at will enjoy or fail to enjoy his floating right, or after enjoying it, may cease to enjoy it either temporarily or permanently. But through all the changes and vicissitudes of time the property right of the canal company remains the same. One person may enjoy the use today and another tomorrow, but the title of the canal company no more changes than does the title of the railroad company to the railroad change because one man rides today and another tomorrow.

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## VI.

**THE CLAIM THAT THE COMPLAINANT CAN NOT CLAIM A DUE RETURN UPON ITS PROPERTY FOR THE ALLEGED REASON THAT THE CLAIM WAS NOT MADE BEFORE THE SUPERVISORS AT THE TIME OF THE PASSAGE OF THE ORDINANCE FIXING THE RATES IS UNFOUNDED.**

Counsel claim in several places in their brief that the company is not entitled to any return on certain property because, as they claim, no such right was asserted before the Board of Supervisors. The Board of Supervisors in fixing water rates acts in a legislative capacity and it is expressly held that it need give no notice to the water company affected and that



the water company affected is not entitled to be heard before the board when the rates are fixed.

*Spring V. W. W. v. San Francisco*, 82 Cal. 286, 315;

*San Diego Land & Town Co. v. National City*, 74 Fed. 79, 81;

*San Diego Water Co. v. San Diego*, 118 Cal. 556, 564.

It would certainly be a peculiar rule if the company should be entitled to no notice and to no hearing, and still waive its rights by failing to appear and set them forth. It is true that the record shows that certain evidence was introduced before the Board of Supervisors, among other things, the canals and works of the company, the carriage of water through the same and the loss thereof in carriage (Trans. p. 1299), value of its rights of way (p. 1500), the amount of the original cost of construction, which included the amount paid for water rights (p. 1305), and the fact that we had to defend our "water rights" (p. 1308). Besides this, the whole proceeding is based on the fact that the company was in possession of water and was selling the same to the inhabitants of the county. The record does not show at all the argument or claims made before the Board of Supervisors, and there is no more reason for assuming that the company did not claim the value of its water rights than there is to assume that it did not claim the value of the structures, both of which were included in the investment of the company. There is no suggestion that the company did not readily give the Board of Super-

visors any information which was requested, and in view of the fact that the counties from the time of the filing of their answers herein have taken the position that we do not own the water rights and are not entitled to any return thereon, it must be assumed that they took the same position when the ordinance was passed, and that they did not desire any evidence as to its value, and that if such evidence had been forthcoming it would have in no way affected their action. However this may be, we are simply taking the position that our property is being taken from us without due process of law, and without just compensation, and there is no rule of law requiring the company to introduce any evidence before the Board of Supervisors in order to entitle it to maintain such a suit.

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## VII.

**THE ORIGINAL CONTRACTS WITH MILLER & LUX WERE ACQUIRED WHEN THAT COMPANY HAD NO CONTROL WHATEVER OVER THE CANAL COMPANY AND THE SUBSEQUENT CONTRACTS WERE LESS FAVORABLE TO MILLER & LUX THAN THE ORIGINAL CONTRACTS.**

It is admitted that both the contract of May 8th, 1871 (Exhibit 6), and the contract of February 7, 1872 (Exhibit 7), were entered into at a time when Miller & Lux had no control whatever over the canal company, and only owned 500 shares of stock therein out of a total of 100,000 shares. It appears that litigation grew out of these contracts, the canal company repudiating them and attempting to charge Miller & Lux

with the full rate for water furnished, notwithstanding the provision of the contract that they should only pay for each crop a sum not exceeding \$1.25 "per acre". After Miller & Lux acquired control of the canal company, a new contract (Exhibit 8) was entered into, by which the rights of Miller & Lux were reduced from 50,000 acres to 33,000 acres, and it was made clear that although the alfalfa should not be cut, but was pastured, they would have to pay \$1.25 for each supply of water which might be necessary to produce the crop. It will therefore be seen that the only two changes made in the contract were made in favor of the canal company and against Miller & Lux, and still counsel in its brief would have it appear that Miller & Lux, in some way, used its power over the canal company to get some advantage.

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## VIII.

### **THE INTIMATION THAT THE COMPLAINANT HAS NOT COME INTO COURT WITH CLEAN HANDS, OR THAT THE TRIAL COURT SO HELD, IS ENTIRELY UNFOUNDED.**

Certainly if either the master or the trial court had been of the opinion that the complainant had not come into court with clean hands and if it had so found, it would not have gone to the painstaking effort of finding the value of complainant's property, its income and expenditures, but would have dismissed the suit on that ground. The fact is that the court never did so hold, nor is there any possible support for any such claim in the record. Appellees base this claim

on the language of the master regarding the meaning of contract Exhibit "E" in which he stated that the dealing between Miller & Lux and the canal company must be in the utmost good faith and that it must come into court with clean hands,—propositions which no one will dispute. He also stated that it would be a perversion of the object of that contract "to apply the same to the carriage of water to lands *which the canal company is able to irrigate* and thus deprive it of a revenue of over twelve thousand dollars".

We would say that this likewise is a proposition which no one would dispute, and which the master and court never even intimated that the canal company or Miller & Lux had ever attempted to dispute.

Let us see, therefore, where the only dispute did arise as to this contract, Exhibit "E". It appears that a suit was pending against the canal company by James J. Stevinson, a riparian owner, to enjoin it from diverting water from the river, and the judge before whom the case was pending announced an opinion to the effect that he would enjoin the canal company from diverting more than 760 feet of water from the river. It will be remembered that at that time the company was diverting something like 1350 feet of water. The court will remember that a prohibitory injunction of that kind is not stayed by an appeal, and therefore for the purpose of avoiding the effect of that decision an agreement was entered into (Exhibit "E", p. 126) between the canal company and Miller & Lux reciting that:

“Whereas by reason of the decision which has been announced by the Superior Court of Merced County in an action by J. J. Stevinson against the party of the first part it appears that the quantity of water which the party of the first part will hereafter be allowed to divert from said river will be less than the capacity of its canals and will be less than sufficient to enable the party of the first part to supply all the necessary demands of its present consumers; and

“Whereas the parties of the second and third parts are willing, in the event that the party of the first part will allow them the aforesaid use of its dam or weir or canals, to assist in relieving the party of the first part by irrigating their riparian lands with water diverted by them as aforesaid—thus permitting the party of the first part to use the water diverted by it for the irrigation of non-riparian lands.”

The agreement then provided that for the carriage of the water to these riparian lands a certain carriage charge should be made, and that if those rates of carriage were not satisfactory they might be readjusted. It should be noted that this agreement was dated December 4, 1905. The master expressly finds that “had the situation been as stated” at the time this agreement was executed it “was a beneficial arrangement to the canal company”. As a matter of fact the formal decision and judgment in the case was not rendered until April 2, 1906 (pp. 1136-40), and by that decision the court limited the canal company to seven hundred and sixty feet for non-riparian lands, but made no injunction as to the diversion of water on riparian lands. It resulted from this that the contract (Exhibit “E”) was entered into under a misappre-

hension of the extent of the injunction and when the canal company learned that it was not enjoined from diverting water to riparian lands this contract was disregarded and Miller & Lux paid the full rate for all riparian lands irrigated by it. The secretary testified that since the execution of that agreement Miller & Lux never claimed the right under that agreement to divert any water which the canal company itself was entitled to divert (Trans., p. 524), and that in the year 1906-7 Miller & Lux paid the regular rates for all waters diverted, irrespective of that contract (Trans., p. 524). In the year 1907-8, Miller & Lux was charged for all of the water used when not over seven hundred and sixty feet was diverted and was also charged the regular rate for all riparian lands irrigated when more or less than seven hundred and sixty feet was carried in the canals (Trans., pp. 524-525). It was found, however, in the year 1907-8 that instead of this excess water being applied to riparian lands more than seven hundred and sixty feet was being applied to non-riparian lands and that being water that the canal company was not entitled to divert, the only thing left for the company to do was to claim that it merely carried the same for Miller & Lux and made a carriage charge therefor (Trans., p. 525), but here a difficulty arose for the reason that no account had been kept of the amount of water actually diverted on riparian and non-riparian lands, and as a result the engineer was compelled to make an estimate of the amount of land which could be irrigated with the seven hundred and sixty feet

of water, and this was done and the balance of the water was considered as water which was diverted for the benefit of Miller & Lux, and if it used it on non-riparian lands it would have to take the responsibility therefor, and the canal company therefore only collected a carriage charge for the same. The court will readily see the position of the canal company in this regard. If it diverted more than seven hundred and sixty feet of water and used it on non-riparian lands it violated the injunction and its officers would be guilty of contempt of court and subject to punishment accordingly. The situation was an unfortunate one and grew out of the failure to keep proper account of the amount of water actually diverted on riparian and non-riparian lands. The master, after having given the matter full consideration determined that in his judgment all of these non-riparian lands might have been irrigated with the seven hundred and sixty feet of water. If they could have been so irrigated, there is no question but the canal company was entitled to full payment therefor, and no one has ever disputed that proposition. We did think that the master was wrong in his conclusion in that regard, but we hope that he was right, because, if so, there is no basis whatever for any claim of a violation of the injunction, and although it resulted in charging the company with the receipt of a large sum of money, which it did not receive, still, as our opening brief clearly shows, on account of the intricacy of the question we did not seek to review it in this court.

Under these circumstances it appears, without any dispute, that our position in this whole matter was the same as that of the master in the lower court, namely: that if these lands could be or were irrigated with water which the canal company was entitled to divert it should be paid for at the regular rates, irrespective of this contract Exhibit "E", and, notwithstanding that contract, Miller & Lux did pay the regular rate for all riparian lands irrigated as soon as it was discovered that the contract was entered into under a misapprehension, and if the court desires to read the portion of the master's discussion as to whether or not all of the non-riparian land could be irrigated with the seven hundred and sixty feet, it will be found that the master himself shows that it is an extraordinarily close question, on which there was room for a very wide difference of opinion, depending largely on the question as to the duty of water, and there is nothing in the master's opinion that even intimates that the canal company acted in anything but the most scrupulous good faith in this matter, and there is nothing even suggesting, much less supporting the claim made that there was any deliberate attempt to benefit Miller & Lux in this matter. Nor is it true, as counsel state, that we ever claimed that the making of a carriage charge for this water was the result of a mistake. Whatever was done was done by the officials of the canal company openly and under the belief honestly existing as shown by the report of their engineer that this land could not be irrigated and was not irrigated with the seven hundred and sixty feet of



water. When the court decided that matter against us we did not think that it was a matter which we could hope to have this court review on appeal, and the mere fact that we do not urge it on this appeal is not, as counsel state, evidence that we "confessed error" (brief, p. 84); nor that our action was the result of a "little mistake" (p. 84). Of course, it has been decided that we were wrong and that decision from a legal standpoint, so far as it involves a question of fact, makes us wrong as to our interpretation of the facts, but that is quite different from the suggestion of bad faith and illegal conduct so unjustly attributed to us by counsel in this matter.

It is sufficient in this regard to refer this court to the consideration of this subject contained in the master's report contained at pages 137 to 150 for the purpose of showing that the master in determining that we could have irrigated all of this non-riparian land with the water in question did so entirely by reason of what we deem a misapprehension as to testimony of Professor Fortier as to the amount of water required per acre, and as a result he applied Professor Fortier's duty of water, given as two and one-half ( $2\frac{1}{2}$ ) acre feet upon the land *without taking into consideration the necessary loss of water by seepage and evaporation which the testimony shows would be at least an average of one-third* (see p. 145) and still appellees use a conclusion of this kind to destroy the good faith of the parties who took the contrary position.

**MISCELLANEOUS POINTS.**

There are several minor matters contained in appellees' brief, and it will be sufficient to call attention to them without any considerable discussion.

1. Counsel state that in the old case the amount of \$112,500 claimed to have been paid to Bensley for water rights was relied upon as showing the amount "invested in the cost of the plant". In the former case, this matter was shown by the same exhibit as was used in this case, namely, Complainant's Exhibit No. 14, page 1105, as being "for water rights, etc."

2. Counsel state on page 19 that there is nothing to show whether the riparian lands of Miller & Lux lie above or below the head of the complainant's canal. This certainly cannot be very important, in view of the fact that Miller & Lux has agreed to permit the company to divert the water and subordinate its rights, whether its lands are above or below the canal, to the rights of the canal company.

3. Counsel attempt to make it appear that the deduction from the structures of twenty-five per cent (25%) was on account of depreciation. This is not true, but on the contrary the master first made a horizontal reduction of twenty-five per cent from the present reproduction cost simply because they could have been built cheaper at an earlier date, and then made a further reduction to cover depreciation.

4. Counsel repeat the error of the trial court in the argument that our claim that the amount lost by reduced rates to riparian owners in consideration of rights granted should be considered in determining

the cost of our water rights is erroneous because this loss goes on indefinitely and the amount would ultimately run into the millions. This is based on an erroneous view of our claim, which is not that the *aggregate amount* of this loss should be considered, but that the *average annual amount* should be capitalized and that we be deemed to have invested an amount equal to the average annual loss thus capitalized. Obviously the amount is constant, no matter how long continued.

5. We do not care to take the time of the court to answer the argument made by appellee to the effect that the canal company should receive a less rate for carrying water through Merced County and into Stanislaus County than for carrying the water only to Merced County. If such an argument does not answer itself, no amount of argument would answer it.

Assuming that the computation of counsel of the percentages of usefulness in the various counties is correctly stated on page 93 of appellees' brief, then it results that the various counties should pay the following percentages of the return from irrigation:

|                                      |          |
|--------------------------------------|----------|
| Fresno, 41/195 of \$121,000.....     | \$25,420 |
| Merced, 96/195 of \$121,000.....     | 59,520   |
| Stanislaus, 58/195 of \$121,000..... | 33,960   |

As Stanislaus County only irrigates 11,000 acres, this would make its proportionate rate about \$3 an acre (see Record, p. 169). We are not adopting the correctness of counsels' figures, but simply showing the futility of attempting to make figures prove the contention that a greater aggregate rate should be made for a short haul than for a long haul.

**CONCLUSION.**

In submitting this case we would say that since this suit was commenced the people of California have come to realize the impropriety of vesting power to establish rates in local boards of supervisors with no special training and often governed by local prejudice, and have vested that power in a state Public Utility Board known as the Railroad Commission. If this court would announce the proper basis upon which the rates of this company should be fixed we can rely upon that board to do complete justice to the company and the public and have this litigation brought to a termination.

Respectfully submitted,

GARRET W. MCENERNEY,

FRANK H. SHORT,

EDWARD F. TREADWELL,

*Solicitors for Appellant.*



## APPENDIX.

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S. F. No. 6555

In Bank

January 20, 1914

TYNDALE PALMER, OTAY WATER LEAGUE et al., Plaintiffs,  
vs. RAILROAD COMMISSION OF THE STATE OF CALI-  
FORNIA and SOUTHERN CALIFORNIA MOUNTAIN WATER  
COMPANY, Defendants.

[1] PUBLIC UTILITIES ACT—ORDER OF RAILROAD COMMISSION—DISMISSAL OF COMPLAINT FOR WATER SERVICE—REVIEW OF ORDER—DUTY OF COURT.—Where upon a proceeding under section 67 of the Public Utilities Act to review an order of the railroad commission dismissing a complaint requesting the commission to order a water company to supply the complainants with water for the purposes of irrigation, it appears upon the showing made to the commission and before the reviewing court that the complainants have no right to such water, the action of the commission will be sustained, regardless of the extent of the judicial power of the commission to make an adjudication of the rights of the complainants.

[2] ID.—WATER RIGHTS—NOTICE OF APPROPRIATION—DESIGNATION OF PLACE OF USE—INSUFFICIENT DEDICATION.—The designation in the notices of appropriation of water of the "places of intended use" thereof, does not constitute a dedication of such water to public use for the benefit of such places, and an order dismissing a complaint for such water service based upon such a claim is properly dismissed.

[3] ID.—WATERS IN NON-NAVIGABLE STREAMS—NATURE OF—PRIVATE WATERS.—Waters flowing in non-navigable streams in this state are in their nature private property, and not "public waters", and there must be a dedication of them to public use to divest the private right.

[4] ID.—ID.—RIPARIAN OWNER—ABSENCE OF RIGHT TO CORPUS OF WATER—MEANING OF RULE.—The true reason

for the rule that there can be no property in the *corpus* of the water running in a stream is not that it is dedicated to the public, but because of the fact that so long as it continues to run there cannot be that possession of it which is essential to ownership.

[5] *Id.*—*Id.*—RIGHTS OF APPROPRIATOR—TITLE ACQUIRED.—An appropriator under the code obtains no title at all by his appropriation, as against any one except the state and the United States, which have consented that he shall thereby obtain the rights pertaining to any public land over which the stream may run, and not because of any existing dedication of such waters to public use, or because of the fact that they are held by the United States or by the state for public use, and as against all other persons interested in the riparian lands or in the water, he must acquire the rights he claims in some other way than by mere appropriation.

For Petitioners—Tyndale Palmer.

For Intervenor—W. R. Andrews, City Attorney, San Diego.

For Respondent—Max Thelen, Douglas Brookman; John M. Eshleman, of Counsel.

For Southern California Mountain Water Company—H. L. Titus, R. G. Dilworth and H. E. Doolittle.

This is a proceeding under section 67 of the Public Utilities Act (Stats. Ex. Sess. 1911, 55) to review an order of the railroad commission dismissing a complaint which the petitioners filed and presented to the commission.

In their complaint the plaintiffs alleged that said water company was engaged in the business of distributing and selling water for public use for irrigation, domestic and other purposes in San Diego county, that it has in its possession and control large quantities of water appropriated to said use, that it obtained said water by virtue of notices of appropriation, posted as provided in the Civil Code, in which the Otay Valley was designated as one of the places of intended use, that the several plaintiffs own lands in the Otay Valley below the level of the pipe lines of said company and within one mile thereof, that their lands require irriga-

tion, that they desire to obtain water from said company for that and other beneficial purposes to be used on their said lands, that they have demanded the same from said company, offering to pay the established water rate therefor, but that the company refused to let them have any water, except on condition that they first deposit the cost of connecting the company's pipes with their lands. They further averred that they believed that they were legally entitled to receive from said company a portion of said water.

They asked the commission to fix a just rate of charges for such water, to order the company to supply water to them and others entitled thereto at such rates, to direct it to discontinue making any charge to consumers for connecting lines or for meters, and to forbid the company from charging a different rate for domestic use where water was also furnished to the same land for irrigation.

Upon the hearing it was agreed that the commission should first ascertain and determine whether or not the plaintiffs had the right to receive from the company the water they claimed. The principal dispute and the only matter of importance was the claim of the plaintiffs to receive water from the company for irrigation. Some three or four of them were and still are receiving water from the company for domestic use, but as we understand the record, the commission found that they were still entitled to receive the water for that purpose, and so declared. The grievances relating to that use were not deemed of sufficient importance to justify an inquiry at that time by the commission, and it did not decide that no such right thereto existed. Upon the claim that the plaintiffs were entitled to water for irrigation, the commission, upon the evidence, determined that they did not have such right and thereupon and for that reason refused to proceed with the application and dismissed the complaint.

[1] We need not determine here whether or not the commission has judicial power authorizing it, in the course of its duties and for the purpose of determining whether or not it will entertain a complaint presented to it, to make an adjudication of the right of the com-



plainants to the water service of which they ask regulation, or that the decision in this case is such an adjudication. If it appears upon the showing made to the commission and before this court that they had no such right thereto, the action of the commission in dismissing the proceeding should be sustained, regardless of the extent of the judicial power it may have. The commission is not bound to investigate alleged abuses and make and enforce regulations for the conduct of a public utility at the instance of persons who have no interest in the service. If it wrongfully refuses to do so, the remedy of the aggrieved party would be *mandamus*, not *certiorari*. *Mandamus* is allowed by section 67 of the Public Utilities Act, for such refusal. We are of the opinion that the complainants, upon the showing made, have no right to receive water for irrigation of their lands. It may be that they still retain the right to an adjudication by a competent court, notwithstanding the decision of the commission and of this court in this proceeding.

[2] The sole ground upon which they claim the right to a share of the water for such irrigation is that their lands are included in the places designated in the notices of appropriation posted by the company as the "places of intended use" of the water claimed in such notices. The theory of the plaintiffs is that this designation of places of intended use constituted a dedication of the waters claimed in the notice to public use for the benefit of all the territory embraced in the designated places, and that when water was thereafter diverted in pursuance of the notices, the persons owning lands within any of the places named have the right to demand a proportional share of such water for use upon such land. In this connection, plaintiffs argue that the waters flowing in non-navigable streams in this state are by law deemed "public waters", devoted to public use for the benefit of the lands, whether contiguous or not, to which they can conveniently be conducted by artificial means; that it was perceived by the legislature that in many places the supply of water would be far too small to serve the entire accessible area and that some method must be devised of determining the limits to which the

dedication should extend; that for this purpose the provision was made in the Civil Code, requiring the person claiming the water and posting the notice to designate the place of use; and that it was intended that thereby the right to the supply should be divested from the general area of lands accessible to the supply and vested exclusively in the places designated.

[3] The theory that the water of a non-navigable stream in this state is in some sense "public water" has been advanced before. It has been claimed that a diversion of water under the provisions of the Civil Code (secs. 1410 to 1422) constitutes a grant of the water by the state to the appropriator. The idea may have arisen from the statement sometimes made in the decisions that the riparian owner has no right in the *corpus* of the water (*Eddy v. Simpson*, 3 Cal. 252), and that running water cannot be made the subject of private ownership, that the right to use the water of a stream "carries no specific property in the water itself". (*Kidd v. Laird*, 15 Cal. 179.) This is far from saying that the property in the water is vested in the public, either for general use, or as property of the state. The doctrine that it is public water, or that it belongs to the state because it is not capable of private ownership, has no support in the statutes of the state or in any decision of this court.

[4] The true reason for the rule that there can be no property in the *corpus* of the water running in a stream is not that it is dedicated to the public, but because of the fact that so long as it continues to run there cannot be that possession of it which is essential to ownership. It is in this respect similar to the air, which cannot be said to be possessed or owned by any person unless it is confined within impervious walls. One may have the right to take water from the stream, even the exclusive right to do so, but in that case he does not have the right to a specific particle of water until he has taken it from the stream and reduced it to possession. It then ceases to be a part of the stream. Such right to the water of running streams as there is under the law is vested entirely in the several riparian owners along its course. It is subject to the common use of all riparian owners, but neither has

a specific property in any part of the water while it remains running in the stream. The United States, with respect to the lands which it owns in this state is a riparian proprietor as to the streams running through such lands. It is only by virtue of that fact that it has any right or power of disposition over the waters thereof. And its right and power in that respect is no greater and no less than that of any other riparian proprietor. By the act of July 26, 1866 (14 U. S. Stats. 251), the United States consented that private persons might acquire rights to water flowing in streams through its lands by taking possession thereof, that is, by diverting the same, in such manner as should be provided by the laws of the particular state. Where such diversion had not been made, a grant of its lands by the United States to a private person without reservation, would carry with it the riparian rights pertaining to that land in streams flowing through it, in the same manner as in the case of a grant of land by a private owner. So, also, the state, with respect to the lands it owns which are not devoted to a specific public use, is in the same category as any other landowner. It has riparian rights with respect to such land in the streams running over it, which its grant carries to the grantee. The provisions of the Civil Code above mentioned have the effect of a declaration by the state that any person who may divert water from a stream in pursuance of those provisions will thereby obtain a right in the stream paramount to the riparian rights which the state may have therein by virtue of the fact that the stream may run over lands then belonging to the state. To that extent it operates as a grant from the state, but this is only because the state had the riparian right, and not because the water was in any sense public water devoted to public use.

These questions received elaborate treatment in the leading case of *Lux v. Haggin*, 69 Cal. 255. On page 390 the fundamental principle is thus stated: "The right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it." If this be true, then the right

to the water is no more public than the right to the land. As to the title of the United States, it is said on page 336: "The lands of the United States (not reserved or purchased for fortifications, etc.) are held, since the admission of the state into the Union, as are held the lands of private persons, with the exception that they are not taxable." It is further shown that even if it be conceded that prior to the cession from Mexico the government of that country possessed a title to the waters, or a power over them, which was in some respects public in its nature, a point not decided, nevertheless this title passed to the United States by the cession from Mexico, and afterwards, by the admission to the Union, passed from the United States to the State of California, and that the act of April 18, 1850, adopting the common law as the law of this state, "should now be held to have operated (at least from the admission into the Union) a transfer or surrender to all riparian proprietors, of the property of the state—if any she had—in innavigable streams and the soils below them". (P. 338.) The riparian owners here referred to were the United States, the state itself with regard to school lands and other lands received from the United States, and the then existing purchasers from either of them. It also declares (p. 372): "As we have seen, one who, since the acts of congress of 1866 and 1870, receives a grant of a portion of the public lands of the United States, without special or implied reservations, takes subject only to appropriations of water made or initiated prior to the grant." Referring to the effect of an appropriation with respect to state lands, it is said (p. 374): "The state had granted the waters running to its own lands, by authorizing the diversion of waters from its lands (referring to the Civil Code provisions), and doubtless such grantees acquire the state property in the waters whenever the state has a property in the waters at the time of the grant." The case then proceeds to state the reasons for the adoption of these provisions of the code. As these seem now to be misunderstood by many, it may be well to again state the conditions which led to the enactment and the purpose sought to be attained.

At the time of the admission of California to the Union and for many years afterwards, the lands embraced within its limits, excepting the Mexican grants, which were located mainly in the valleys, were, for the most part, the property of either the United States or of the state. There was urgent need for the use of the waters of the streams, especially in the mining operations which then constituted the main resource of the state. There were no laws provided whereby the right to divert and use these waters could be acquired from the state or from the United States. Both sovereignties, however, permitted such diversion by any one who could put the water to beneficial use. Diversions were accordingly made and immediately there began to arise disputes relating to interfering diversions from the same stream, which speedily found their way into the courts and it became necessary to ascertain the rules of law by which claims of that kind were governed. An analogy was found in the rules of the common law relating to controversies over the possession of land between persons who had no title thereto and in which the real owner did not interfere or intervene. (See *Katz v. Walkinshaw*, 141 Cal. 135.) It was held that, since the real owner of the water rights, that is, the United States or the state, permitted these diversions and was not in court to assert its rights or to be bound by the decision, the matter between the persons litigating was to be decided according to the rules of law in regard to priority of possession of land. The diversion of the water was declared to be the equivalent of possession and the doctrine was laid down that he who was first in time was first in right. But it soon appeared that valuable rights were involved before there was or could be an actual diversion. The making of a dam was necessary before water could be taken, and this frequently required considerable time and the expenditure of large sums of money. It was necessary to define the rights which accrued from the labor and expense of constructing the diversion works, with respect to different works begun about the same time and before any actual diversion by either claimant. To meet this condition, the courts held that the person who first began the construction of such works and did so in such manner

that his intent to divert water thereby was manifest, was entitled to priority in the diversion subsequently made by him, provided he acted in good faith and prosecuted the work with reasonable diligence. The cases stating this doctrine are cited in *Inyo C. W. Co. v. Jess*, 161 Cal. 519. Difficult questions of fact would also arise with respect to the actual dates of the beginning of work on the conflicting claims, questions which would generally have to be determined after the lapse of years and when the dates could not be satisfactorily ascertained. And it was also found that frequently a person intending to divert water would be put to great expense in the mere preparation necessary to begin the work and before any actual and visible operations upon the stream itself could be initiated. The provisions of the Civil Code, particularly section 1415, requiring the posting of a notice, section 1416, allowing sixty days within which to begin the "excavation or construction of the works", and section 1418, declaring that upon compliance with the code the claimant's right would relate back to the time of the posting of the notice, were made to remedy and remove the practical difficulties which previously existed in adjudicating the rights of hostile claimants under these circumstances. (*Inyo C. W. Co. v. Jess*, supra.) There is absolutely nothing in this statute to indicate that the legislature supposed that the appropriation made in pursuance thereof was in the nature of a grant by the state of any property of the state in the water of the stream from which the diversion was to be made. As stated in *Lux v. Haggin*, supra, the statute was a consent by the state to the taking of the water so far as it infringed upon the riparian rights of the state by virtue of any lands which it might own situated upon the stream, and to that extent it operated as a grant. But that was a grant of a right which was private in its nature, a right pertaining to the particular tracts of land owned by the state and held by the state only because of such ownership. It was not a general right to the waters of the stream as a whole. And unless it happened that the state owned land upon the stream at the time of the diversion, a condition which in fact seldom occurred, the state would part with no right whatever by the appropriation. As we

have seen, there was no existing public right in the waters which the state could transfer to the appropriator. The whole purpose of the statute was to provide evidence whereby parties claiming under hostile diversions could establish their respective priorities and corresponding rights to the water and avoid the former difficulties in establishing the precise date of the inception of their respective enterprises. (*Inyo etc. Co. v. Jess*, *supra*, p. 520.)

[5] The appropriator under the code obtains no title at all by his appropriation, as against any one except the state and the United States. Such right as he obtains from these he receives because of the fact that by the law of 1866 and by the provisions of the code, the United States, and the state, respectively, have consented that he shall thereby obtain the rights pertaining to any public land over which the stream may run, and not because of any existing dedication of such waters to public use, or because of the fact that they are held by the United States or by the state for general public use. As against all other persons then interested in the riparian lands or in the water of the stream, he must acquire the right he claims in some other way than by the mere appropriation in compliance with the code. He may do so by purchase and grant from such other claimants and owners, or he may do so by prescription, that is, by adverse use for the period of five years without interruption by the real owner. The only aid which his appropriation notice will afford him in establishing title by prescription against the riparian owner is that it may be admissible as evidence tending to show the date of the beginning of his hostile diversion. In suits against others as mere appropriators, it establishes the date of the inception of his right.

The proposition that the waters of a non-navigable stream are in their nature private property and not property primarily devoted to public use is not only established by authority; it is demonstrable from well-established principles of the law of real property. The right to the waters of a stream is real property, a part of the realty of the riparian lands originally, and a part of the realty as an appurtenance to any



other lands to which it may be rightfully taken when the riparian rights have been divested in favor of the user on non-riparian land. This was decided as early as *Hill v. Newman* (5 Cal. 446), where the court said: "The right to water must be treated in this state as it has always been treated, as a right running with the land, and as a corporeal privilege bestowed upon the occupier or appropriator of the soil; and as such, has none of the characteristics of mere personalty." (See, also, *Lux v. Haggin*, 69 Cal. 392; *Santa Paula v. Peralta*, 113 Cal. 43; *Stanislaus W. Co. v. Bachman*, 152 Cal. 725; *Shurtleff v. Kehr*, 163 Cal. 26; *Merritt v. Los Angeles*, 162 Cal. 50; *Copeland v. Fairview etc. Co.*, 165 Cal. —, 131 Pac. 121.) Until some change is made in natural conditions, there is no existent right to the water of a stream, except that vested in the riparian owners. They alone can lawfully have access to the stream, and therefore they only, in a state of nature, may lawfully use it or divert it from the stream. Hence, the right to the water of flowing streams in this state, prior to any sale or disposition of lands by the state or by the United States, was vested in the state or in the United States, not in their respective governmental capacities as sovereign and for the common use of the people, but as riparian owners in their respective capacities as landed proprietors. These rights were and still are strictly proprietary and in their nature private. When land was disposed of by either, the riparian water right pertaining thereto passed to the purchaser as a part of that realty. It necessarily remained a private right, since the sale did not have the effect of dedicating it to public use. All these rights belong primarily to the riparian owners, consisting of the United States, the state, and purchasers from one or the other of them. They cannot be divested from these riparian owners and have not been divested from them, except by their consent, expressed, as by statute or by actual grant or contract, or implied, as by prescription; or by enforced taking for public use, as by condemnation. It follows that they remain private property when they pass to purchasers, and that when they pass from the riparian owner to others by prescription, grant or consent, they do not by that transfer become im-



pressed with any public use and it still remains true that there must be a dedication to public use to divest the private right. They are no more public than is the land to which they belonged and of which they formed a part.

Finally, on this point, the decisions in this state are to the same effect. *Lux v. Haggin*, we have already mentioned. The recent case of *Thayer v. California Development Co.*, 164 Cal. 125, states the rule to be that the right obtained by an appropriation under the code, is a private right, that the waters appropriated are not thereby appropriated to public use, and that they remain private property until the appropriator dedicates them to public use, which he may do or not at his own pleasure. The other cases holding this doctrine directly or in effect are cited in that case.

The result of these conclusions is that the Southern California Mountain Water Company did not dedicate the appropriated waters to public use by posting these notices, that whatever dedication it may have made of the waters to public use was made in some other manner and that the territory to which that water is dedicated is not necessarily the same as the places of intended use named in the notices. That territory being far in excess of that which the water could supply, the dedication would be manifested by the act of carrying the water to some place and there selling it to those who apply, or by agreeing to supply some specified district with the water. The company has not supplied, or agreed to supply, the plaintiffs with water for irrigation. The water it has, according to the findings of the commission, is necessary to supply the inhabitants of the city of San Diego. It follows that the plaintiffs have no right to receive additional water from this supply for purposes of irrigation upon their lands and that the order dismissing the proceeding is not injurious to them.

The order of dismissal is affirmed.

SHAW, J.

We concur:

HENSHAW, J.

LORIGAN, J.

MELVIN, J.

ANGELLOTTI, J.

\*TYNDALE PALMER et al., Plaintiffs, vs. RAILROAD COMMISSION  
OF THE STATE OF CALIFORNIA, Defendant.

[1] WATER RIGHTS—ACQUISITION BY APPROPRIATION—DENIAL OF PETITION FOR REHEARING OF APPEAL—CODE AMENDMENT OF 1911 INAPPLICABLE.—It is *held* in denying a petition for a rehearing of this appeal (47 Cal. Dec. 201) that the amendment of 1911 to section 1410 of the Civil Code declaring that “all water or the use of water within the State of California is the property of the people of the State of California”, is inapplicable to the case.

[2] ID.—ID.—VESTED RIGHTS UNAFFECTED BY AMENDMENT.—Water rights acquired under appropriation made prior to the passage of such amendment are not divested thereby.

[3] ID.—ID.—POSSIBLE EFFECT OF AMENDMENT.—The amendment may possibly be effective as a deduction to general public use of any riparian rights which the state, at the time it was enacted, may still have retained by virtue of its ownership of lands bordering on a stream, rights in the stream which it would in such case have in common with the owners of other abutting land.

For Petitioners—Tyndale Palmer.

For Intervenor—W. R. Andrews, City Attorney, San Diego.

For Respondent—Max Thelen, Douglas Brookman; John M. Eshleman, of Counsel.

For Southern California Mountain Water Company—H. L. Titus, R. G. Dilworth and H. E. Doolittle.

BY THE COURT.

[1] In a petition for rehearing the plaintiffs quote the opening clause of the amendment of April 8, 1911, to section 1410 of the Civil Code. The section formerly

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\* 47 Cal. Dec. 201.

read as follows: "The right to the use of running water flowing in a river or stream or down a canyon or ravine may be acquired by appropriation." By the amendment this was prefaced by the following declaration: "All water or the use of water within the State of California is the property of the people of the State of California." This, it is claimed, is contrary to the doctrine declared and followed in the opinion of this court herein. This section was not cited in the briefs upon which the case was submitted. We refer to it now solely in order to show that it has no application to the case. [2] All the water rights which were in dispute in the case arose and were acquired by and under appropriations made long before the passage of the amendment aforesaid. It ought not to be necessary to remind any one that a law of this character is not retroactive, or that it cannot operate to divest rights already vested at the time it was enacted. [3] The amendment may possibly be effective as a dedication to general public use of any riparian rights which the state at the time it was enacted, may still have retained by virtue of its ownership of lands bordering on a stream, rights in the stream which it would in such cases have in common with owners of other abutting land. It could not affect the riparian rights of the other owners, nor the rights of any person or corporation claiming under them, nor rights previously acquired from riparian owners by prescription, nor rights acquired from the state prior to that time by appropriation under the code, in reliance upon the implied offer of the state to allow its riparian rights to be acquired in that manner, as indicated in the opinion.

The petition for a rehearing is denied.

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# In the Supreme Court

OF THE

## United States

\_\_\_\_\_  
OCTOBER TERM, 1913.  
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U. S. SUPREME COURT, U. S.

FILED

JAN 13 1914

JAMES D. MAHER

CLERK

THE SAN JOAQUIN AND KINGS RIVER CANAL AND  
IRRIGATION COMPANY, INCORPORATED (a cor-  
poration),

*Appellant,*

vs.

THE COUNTY OF STANISLAUS IN THE STATE OF  
CALIFORNIA et al.,

*Appellees.*

No. 303

### BRIEF FOR APPELLEES.

\_\_\_\_\_

JAMES P. LANGHORNE,

L. J. MADDUX,

PARKER S. MADDUX,

DENVER S. CHURCH,

M. F. McCORMICK,

H. S. SHAFFER,

*Solicitors for Appellees.*

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**In the Supreme Court**  
OF THE  
**United States**

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OCTOBER TERM, 1913.

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THE SAN JOAQUIN AND KINGS RIVER CANAL AND  
IRRIGATION COMPANY, INCORPORATED (a cor-  
poration),

*Appellant,*

vs.

THE COUNTY OF STANISLAUS IN THE STATE OF  
CALIFORNIA et al.,

*Appellees.*

No. 303

**BRIEF FOR APPELLEES.**

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Not being satisfied with the statement by the appel-  
lant, we submit the following:

**Statement of the Case.**

This suit was brought by complainant, the appel-  
lant, against defendants, the appellees, to have the  
Court vacate and annul certain ordinances passed  
by the Supervisors of the Counties of Stanislaus, Mer-  
ced and Fresno, fixing under the California Statute  
of March 12, 1885 (Stats. 1885, p. 95), the rates to be

charged by complainant for water appropriated and supplied by it to the inhabitants of said counties as provided by said statute. A copy of said statute is appended to this brief as Appendix.

Complainant's application for such relief is based upon the allegation that the water rates so fixed would not permit it to receive a reasonable return upon the value of its property so devoted to public use and would, if enforced, deprive complainant of its property without due process of law in violation of the provisions of the fourteenth amendment to the Constitution of the United States (bill of complaint, par. 53, Rec. p. 11).

Upon the commencement of the suit, the Circuit Court, upon the bill of complaint and affidavits, granted complainant an injunction *pendente lite* against the enforcement of the rates after the then pending irrigation year 1907-8; that is, the rates fixed by the counties in May and June, 1907, were by the Court allowed to be in force *pendente lite* only during the said irrigation year commencing July 1, 1907, and ending June 30, 1908.

While the bill of complaint attacks three sets of water rates, viz.: those fixed in 1896, in 1904, and in 1907, yet it is conceded by all the parties that the rates of 1896 and 1904 were superseded by those of 1907, and that the water rates of 1907 are the only ones in controversy in this suit.

When the case was at issue, the Circuit Court, *by consent of the parties*, made its order referring the

case to the standing Master of the Court, the Hon. E. H. Heacock, to decide the issues in the suit (Rec. p. 56).

The Master took and heard the oral and documentary proofs submitted by the parties. The case was argued by counsel before the Master, who thereafter made and filed his written report to the Court of his findings of facts and conclusions of law (Rec. pp. 56 to 159).

The Master in his report found the facts, and rendered his conclusions of law and decision in favor of defendants and against complainant, viz.:

"That the concurrent operation of the annual rates fixed by the respective Boards of Supervisors of the three counties of Fresno, Merced and Stanislaus, to go into effect on the 1st day of July, 1907, *would produce a net income* upon all the property of complainant used and useful in the appropriation and furnishing of water to the inhabitants of said counties in the year commencing July 1, 1907, *of 7.704 per cent, and that such net income would be a just and reasonable compensation to the complainant for the furnishing of such water*" (Rec. p. 159).

The summary of the Master's findings of facts and conclusions of law, as set forth on pages 158 and 159 of the printed record, is as follows:

#### SUMMARY.

##### *Fresno County.*

|                          |              |
|--------------------------|--------------|
| Value of Earthwork.....  | \$155,370.73 |
| Value of Structures..... | 99,439.12    |
| Rights of Way.....       | 13,414.00    |
| Land at Headworks.....   | 1,568.80     |
|                          | <hr/>        |
|                          | \$269,792.65 |

*Merced County.*

|                          |              |              |
|--------------------------|--------------|--------------|
| Value of Structures..... | \$104,137.40 |              |
| Value of Earthwork.....  | 243,060.08   |              |
| Rights of Way.....       | 101,955.00   |              |
| Land at Quinto Section   |              |              |
| House .....              | 7,700.00     |              |
| Los Banos Lots.....      | 600.00       |              |
|                          |              | <hr/>        |
|                          |              | \$457,452.48 |

*Stanislaus County.*

|                          |             |              |
|--------------------------|-------------|--------------|
| Value of Earthwork.....  | \$31,064.47 |              |
| Value of Structures..... | 17,284.08   |              |
| Rights of Way.....       | 28,750.00   |              |
|                          |             | <hr/>        |
|                          |             | \$ 77,098.55 |

|  |              |              |
|--|--------------|--------------|
| Total of above property.....   |              | \$804,343.68 |
| Additional personal property kept on hand .....  |              | 8,930.84     |
| Interest at 7 per cent on investment during construction .....                             |              | 63,555.03    |
| Amount of money necessary to be kept on hand .....   |              | 20,000.00    |
| Total value upon which complainant is entitled to a net income of at least 6 per cent..... |              | \$896,829.55 |
| Total receipts.....  | \$136,697.35 |              |
| Maintenance  |              |              |
| Account....  | \$67,114.84  |              |
| Excise Tax...  | 488.10       | 67,602.94    |
|  |              | <hr/>        |

Net Income ..... \$ 69,094.41

\$69,094.41 divided by \$896,829.55, equals 7.704 per cent income.

For the reasons set out in this opinion, I find that the concurrent operation of the annual rates fixed by the respective Board of Supervisors of the three counties of Fresno, Merced and Stanislaus, to go into effect on the 1st day of July, 1907, would produce a net income upon all the property of complainant used and useful in the appropriation and furnishing of water to the inhabitants of

said counties in the year commencing July 1, 1907, of 7.704 per cent, and that such net income would be a just and reasonable compensation to the complainant for the furnishing of such water'' (Rec. p. 159).

Complainant filed certain exceptions to the findings of fact and conclusions of law set forth in the Master's report (Rec. pp. 171 to 176), and, upon final hearing, the Circuit Court confirmed the Master's report and findings, except that the Court, as against the Master's finding, allowed complainant the sum of \$9,561.06 as the annual depreciation of its plant (Court's opinion, Rec. p. 213). Such allowance would reduce the annual net revenue of \$69,094.41 as found by the Master to \$59,533.35, which would give complainant an annual net return of 6.63 per cent, under the county water rates complained of, upon \$896,829.55, the value of its plant as found by the Master. Upon such confirmation of the Master's report, the Circuit Court entered its decree dissolving the injunction *pendente lite* and dismissing the bill of complaint (Rec. pp. 181-183).

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### **Brief of Argument.**

#### **Water-Rights.**

**THE MASTER AND THE CIRCUIT COURT DID NOT ERR IN REFUSING TO INCLUDE IN THE VALUATION OF COMPLAINANT'S PLANT THE ALLEGED VALUE OF THE SO-CALLED "WATER RIGHTS" THAT COMPLAINANT CLAIMS TO OWN.**

Counsel for complainant devote the major part of their argument in support of the claim that appellant, at the time of the fixing of the water rates by the

county boards of supervisors in 1907, had the right to divert from the San Joaquin River 760 cubic feet of water per second; that such right of diversion was alleged in the bill of complaint to be of the value of \$760,000.00 (Rec. p. 3); that the value of complainant's water rights was \$750,000.00 (brief p. 7), and that the Master and the Court erred in refusing to include in the valuation of complainant's works any value for such claimed water right.

Had the alleged water right been valued at \$760,000.00, and added to the \$896,829.55 valuation of the works found by the Master and the Court, the total valuation would have been \$1,656,829.55, and the appellant's net annual income from the rates complained of would have been 3.65 per cent upon such valuation after deducting the charges for maintenance, etc., as finally approved by the Court.

- (a) **ASSUMING, FOR THE ARGUMENT, THAT COMPLAINANT WAS THE OWNER OF SAID ALLEGED WATER RIGHT AT THE TIME THE RATES WERE FIXED BY THE COUNTY SUPERVISORS, NEVERTHELESS IT HAS NO STANDING IN THE FEDERAL COURT TO COMPLAIN OF THE NON-INCLUSION OF THE VALUE OF SUCH WATER RIGHT, BECAUSE WHEN THE RATES COMPLAINED OF WERE BEING FIXED BY THE COUNTY SUPERVISORS UPON APPELLANT'S OWN INITIATIVE AND PETITION, IT WHOLLY FAILED TO CLAIM BEFORE SAID RATE BOARDS THAT IT OWNED ANY WATER RIGHT, OR TO SUBMIT TO THEM ANY EVIDENCE OF THE VALUE OF ANY SUCH WATER RIGHT.**

The proceedings to have complainant's rates for the year commencing July 1, 1907, fixed by the county boards of supervisors under the State Irrigation Act



of 1885, were inaugurated by complainant (Rec. pp. 7, 8, 9).

Upon the trial of this suit before the Master, defendants offered and there were introduced and admitted in evidence the proceedings and evidence that were had and introduced before the boards of supervisors of the counties of Stanislaus, Merced and Fresno, in the matter of their hearing of complainant's petition to fix the water rates of 1907, complained of by complainant in this suit (Rec. pp. 642, 643, 644; Exhibit N, Rec. pp. 1287 to 1347; Exhibit 20, Rec. p. 1126; Appellant's maintenance accounts from 1895 to 1906, Rec. pp. 1341 to 1347).

Said Exhibit N (Rec. pp. 1287 to 1347) sets forth all the proceedings had before said rate board, and notes all the testimony and other evidence introduced by complainant on the one side and by the counties and irrigators on the other. This evidence by complainant consisted of certain written estimates and testimony by its engineer, R. H. Goodwin, as to the cost of reproducing the earthwork and structures, and which written estimates were the same as complainant's Exhibit 1 (Rec. pp. 930 to 1058. See also appellant's brief p. 111); and of the testimony of other witnesses as to the cost of excavation, lumber and material, as to the value of the right of way, as to the seepage and evaporation of water, as to the number of acres of land irrigated, as to the receipts from water, and as to costs of maintenance; *but complainant did not before said boards of supervisors make any claim that it owned any water right, nor did it introduce before said boards any evidence as to any value of any water right, nor*

*was any water right referred to by the complainant, or by any person during the hearing before these rate boards.* It may also be here noted that the record in the former rate case between these same parties as to the county rates of 1896, and decided by this Court in 192 U. S. p. 201, will show that complainant in that suit made no claim that it owned any water right, or that any value of any water right had been excluded from the valuation of its plant.

Not until this present suit did complainant ever claim that it owned a water right and that such water right had a value which should have been included.

Complainant is here complaining that the rates fixed by the county boards in 1907 are, as a whole, confiscatory, in that they will not give it an annual income of at least 6 per cent upon the value of its plant, and this contention is based almost entirely upon the claim that this is so because the alleged value of such water right has not been included by the Master and the Court in valuing its plant. Our reply to this is that complainant has no standing in a Court of equity to ask a decree vacating water rates made by the county boards, as unreasonably low because the value of an alleged water right was excluded, when it appears, as here, that it never, when before those boards on its own petition to fix rates, made the claim that it owned a water right, and never introduced any evidence as to the value of any water right and never once referred to a water right in any connection. We are aware that the Courts have held in a number of rate cases that they will not review the evidence upon which rate boards may have acted, when it does not appear that

they have acted arbitrarily, but such rulings were made in response to claims by public service corporations that the rate boards had acted without considering competent or sufficient evidence. Such cases differ, we submit, from the question here presented and which comes within the rulings of this Court in the cases presently referred to.

The rate fixing board is not supposed to know except from the evidence furnished it by complainant of what its properties subject to valuation, consist, and we ask was it ever contemplated that a public service corporation, failing to disclose to such board that it owned a valuable piece of property, could, *after the board had fixed the rate*, have a right to ask any Court to set aside such rate because the board had excluded the value of such particular element of its property undisclosed by it to the board, and in no manner called to its attention?

In *Home Tel. & Telg. Co. v. Los Angeles*, 211 U. S. 265, where this Court refused to restrain the enforcement of a city ordinance regulating telephone rates, it is said (p. 281):

“It is to be taken into account in considering this, as well as other questions, that the appellant has declined to furnish to the council facts within its knowledge which would enable the council to exercise their powers intelligently and justly.”

In *Knoville v. Knoxville Water Co.*, 212 U. S. 1, this Court, after calling attention to the fact that a rate ordinance was the exercise of a legislative function, proceeds to say (p. 8):

“There can be at this day no doubt, on the one hand, that the courts, on constitutional grounds, may exercise the power of refusing to enforce legislation, nor, on the other hand, that the power ought to be exercised only in the *clearest cases*. The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact, *the invalidating facts must be proven to the satisfaction of the Court.*” (Italics ours.)

and, again (p. 18):

“The city authorities acted in good faith, and they tried, without success, to obtain from the company a statement of its property, capitalization and earnings.”

Speaking of the regulation of public service corporations, the Court further says (p. 18):

“It is a delicate and dangerous function and ought to be exercised with a keen sense of justice on the part of the regulating body, *met by a frank disclosure on the part of the company to be regulated.*” (Italics ours.)

We think that the above rulings of this Court clearly establish the principle that a public service corporation has no standing in Court to complain of, or to have adjudged as unreasonably low, the rates made by a state board, when it appears, as here, that complainant's claim is based chiefly upon its assertion that certain of its properties were not valued, and when it also appears, as here, that the rate fixing proceeding was inaugurated by complainant before the rate board, and that it wholly failed to introduce before such board any evidence as to the value of such alleged omitted property, or to then claim to own it, or to refer to it in any manner.

Furthermore, the same record of proceedings before the rate boards shows that complainant never claimed to own, nor referred to, nor introduced any evidence of value as to any "franchise", or as to any "good will", or as to any "going concern", although it now claims that the alleged values of such things should have been included in estimating and fixing the rates.

- (b) ASSUMING, FOR THE ARGUMENT, THAT COMPLAINANT WAS THE OWNER OF SAID ALLEGED WATER RIGHT AT THE TIME THE RATES WERE FIXED, NEVERTHELESS THERE IS NO PROOF IN THE RECORD THAT THE WATER RIGHT COST COMPLAINANT OR ITS PREDECESSORS ANYTHING. SO FAR AS APPEARS FROM THE RECORD, COMPLAINANT AND ITS PREDECESSORS ACQUIRED THE ALLEGED WATER RIGHT BY SIMPLY DIVERTING AND TAKING THE PUBLIC WATERS FROM THE PUBLIC STREAMS OF THE STATE WITHOUT ANY OBJECTION FROM ANY RIPARIAN OR OTHER CLAIMANT OF WATER. CONSEQUENTLY, THE WATERS SO DIVERTED WERE PUBLIC WATERS OF THE STATE OF CALIFORNIA, OPEN TO DIVERSION AND USE BY THE PUBLIC, AND AS COMPLAINANT AND ITS PREDECESSORS PAID NOTHING FOR SUCH WATERS OR FOR THE RIGHT TO DIVERT THEM, COMPLAINANT HAS NO RIGHT TO HAVE ITS ALLEGED WATER RIGHT VALUED IN THE PROCEEDING TO FIX THE RATE TO BE CHARGED BY IT TO THE PUBLIC FOR USE OF SUCH WATERS.

As to this matter, complainant claims (brief pp. 106 to 109) that it and its predecessors have paid the following for its alleged water rights, viz.:

|  |              |
|--|--------------|
| To John Bensley .....                        | \$112,500.00 |
| To Miller & Lux in rebates from water rates. | 188,263.00   |
| To Miller & Lux in surplus waters valued at. | 166,666.00   |
| <hr/>  |              |
| Total .....                                  | \$467,429.00 |

The Master, as appears from his report, examined fully and most carefully into this claim, and found that no such moneys or considerations, or that any consideration, had been paid by complainant, or its predecessors, for the alleged water rights (Rec. pp. 106 to 117).

**JOHN BENSLEY WAS NOT PAID \$112,500.00, OR ANYTHING, FOR ANY WATER RIGHT.**

As to the alleged expenditure of \$112,500.00 to John Bensley for water rights, complainant attempted to prove that in 1871, one of its predecessor corporations had paid to Bensley said sum for water rights, and for such purpose its Secretary Merritt, who entered complainant's employ in 1883 (Rec. p. 333), testified upon his direct examination that, according to his best recollection, the books showed that Bensley had been credited with a stock assessment amounting to \$112,500.00, in consideration of "water rights, etc., and rights of way" (Rec. p. 337).

Upon cross-examination he stated that he did not know of the transaction of his own knowledge; could not tell what book it was found in; did not remember what the entry in the book was, but thought it had appeared in a book that had been destroyed (Rec. pp. 376-377). Complainant also introduced two statements, Exhibits 13 and 14, purporting to give the original cost of complainant's properties and to have been made up from the books of the company prior to their destruction. Exhibit 13 contained the item "Paid John Bensley *et al.* in stock 15,000 shares at \$7.50 for remainder of property of old company \$112,500.00", and upon Ex-

hibit 14 the item "Paid John Bensley *et al.* in stock 15,000 shares at \$7.50 for water rights, etc., \$112,500." (Rec. pp. 1104, 1105). Defendant introduced in evidence the original minutes of the meeting of the directors of the water company held December 31, 1874, setting forth the claim of Brereton, the chief engineer, that the said 15,000 shares of stock given to the old company (Bensley) were in excess of what was legally due it "*on account of construction*" (Rec. p. 386). There was, furthermore, no proof by complainant that Bensley owned any water rights. There was no proof as to how much of the \$112,500.00 was paid Bensley for rights of way, or for construction, or for water rights, or for "etc." There was no proof that any sum that may have been paid to Bensley for water rights was its reasonable cost or value. In the former rate case of *Stanislaus County v. San Joaquin & K. R. C. & I. Co.*, 192 U. S. 201, the above amount claimed to have been paid Bensley was included in what it was claimed the books of account showed had been invested in the cost of the plant, and this Court there decided that such alleged proof by the books was not satisfactory evidence, especially as the books did not show that the amounts alleged to have been paid were reasonable cost or value. Consequently, the Master was fully justified by the state of the proof, the burden of which rested upon complainant, in finding that it had not been shown that complainant, or its predecessors, had paid John Bensley the sum of \$112,500.00, or any particular sum of money for any water right (Rec. p. 115).

**THE REBATES FROM WATER RATES ALLOWED TO MILLER & LUX BY COMPLAINANT AND ITS PREDECESSORS AND CLAIMED TO AMOUNT TO \$188,263.00, WERE NOT ALLOWED IN CONSIDERATION OF ANY WATER RIGHT.**

The discriminating water rate contracts calling for such rebates and the proofs showing that Miller & Lux in December, 1877, acquired a majority of the stock and complete control of complainant's predecessor, and as they still have of complainant, are as follows:

On the 18th day of May, 1871, complainant's predecessor, the San Joaquin & Kings River Canal Company, made a contract (Exhibit 6, Rec. p. 1074) with Miller & Lux (then a copartnership, but subsequently, as the record shows, a corporation) (Rec. p. 415) whereby the canal company agreed to construct a canal for 60 miles, and to furnish Miller & Lux water to irrigate 50,000 acres of land, and whereby, under certain conditions, Miller & Lux were to pay the canal company a subsidy of \$20,000.00. Miller & Lux also agreed to give and *grant a right of way* for the canal over their lands in Fresno and Merced counties, and they also agreed to pay for irrigation a sum not exceeding \$1.25 per acre for each crop, or the prices paid by other parties. On the 7th day of February, 1872, complainant's predecessor and Miller & Lux entered into a contract (Exhibit 7, Rec. p. 1077) by which the above contract (Exhibit 6) *was expressly canceled*. By Exhibit 7, Miller & Lux agreed to pay complainant's predecessor a subsidy towards building the canal of \$20,000.00, so that it would irrigate 50,000 acres of their lands. Miller & Lux also *gave and granted* to it a *right of way* over their lands for the canal in the counties of Fresno,



Merced and Stanislaus, and in clause 5 agreed to pay it "for water furnished by it used in irrigating each crop, the regular price paid by others for irrigation, not to exceed \$1.25 per acre". No riparian or other water rights were granted by Miller & Lux to the canal company in consideration of any reduced water rates, or upon any considerations by the contracts, Exhibits 6 and 7.

It appears that differences arose between complainant's predecessor and Miller & Lux as to the non-payment by the latter for irrigation under the last above contract, and that complainant's predecessor brought suit against Miller & Lux to recover \$70,000.00 on that account. Now, while this suit was pending, and no doubt because of it, Miller & Lux in December, 1877, obtained control of a majority of complainant's stock and of its board of directors (Rec. p. 387). On November 12, 1879, complainant's predecessor entered into a further agreement with Miller & Lux (Exhibit 8, Rec. p. 1082) dismissing said suit, and making the following provisions as to charges against Miller & Lux for water (the Exhibit A referred to being the aforesaid Exhibit 7):

"Said party of the first part, in consideration of the premises and of the execution and delivery of said deed (right of way) hereby covenants and agrees that subdivision fifth of the contract referred to as Exhibit 'A' in the complaint filed in that certain action now pending in the Judicial Court of the Nineteenth Judicial District of the State of California, in and for the City and County of San Francisco, entitled 'the San Joaquin and Kings River Canal and Irrigation Company v. Henry Miller and Charles Lux,' being the same

contract hereinbefore referred to and bearing date the seventh day of February, A. D. 1872, shall be construed to mean that this company, the party of the first part herein, will deliver water thereunder at its regular rates not exceeding one dollar and twenty-five cents per acre per crop, provided the crops are cut, but in case the alfalfa lands should be pastured, then each supply of water of the usual quantity supplied to produce a crop shall be deemed to be such a supply as will entitle a charge to be made therefor, the same as if a crop shall be cut, and said subdivision shall likewise apply with the proviso aforesaid, to said Miller & Lux, their tenants, employes, heirs, executors and administrators, and shall run with the land so long as this company exists to the extent of thirty-three thousand, three hundred and thirty-three and one-third ( $33,333\frac{1}{3}$ ) acres, but shall not apply to the grantees of said Miller & Lux, nor to the grantees of their heirs, executors, or administrators."

Complainant's secretary, Mr. Merritt, testified that this \$70,000.00 was, on this settlement, credited to Miller & Lux on their water account with complainant (Rec. p. 380). See also resolution (Rec. p. 380). We see therefore that, under this contract (Exhibit 8) made in 1879, Miller & Lux could use all the water they desired and as often as they pleased to produce one crop a year to the extent of  $33,333\frac{1}{3}$  acres at rates not exceeding \$1.25 per acre. Miller & Lux did not by the contract, Exhibit 8, convey to the canal company any riparian or other water right in consideration of any reduced water rate, or for any consideration, or at all. Complainant agreed with Miller & Lux, by contract (Exhibit 9, Rec. p. 1084), dated December 24, 1897, that the latter need only pay

“for each crop irrigated, or for water furnished of the usual quantity, supplied to produce a single crop, *one-half of the regular rates per season of two crops*, but not in any case to exceed \$1.25 per acre per crop”.

Miller & Lux did not by the contract, Exhibit 9, convey to the canal company any riparian or other water right, in consideration of any reduced water rate, or upon any consideration, or at all.

On May 18, 1899, complainant and Miller & Lux entered into a contract (Exhibit 10, Rec. p. 1086) to the effect that Miller & Lux had a right to use the so-called surplus waters of the canal upon their uncultivated grass lands, free of charge. Miller & Lux did not by the contract, Exhibit 10, convey to the canal company any riparian or other water right, in consideration of any reduced water rate, or upon any consideration, or at all.

The next contract (Exhibit 11, Rec. p. 1088), made August 17, 1898, between complainant, the California Pastoral & Agricultural Company and Miller & Lux, recognized and stated that the complainant canal company had the prior right to divert 775 cubic feet of water per second from the San Joaquin River, but by it Miller & Lux neither conveyed nor purported to convey to the canal company any of their riparian, or other, water rights in consideration of any reduced water rate, or for any consideration, or at all.

On the 4th of June, 1911, complainant canal company, Miller & Lux and others entered into a contract (Exhibit 12, Rec. p. 1094) recognizing and confirming the right

of the canal company to divert from the San Joaquin River 1350 cubic feet of water, but by said contract Miller & Lux did not convey nor purport to convey to the canal company any of their riparian or other waters, in consideration of any reduced water rate, or any consideration, or at all.

An examination of the foregoing contracts wholly disproves the claim by counsel that Miller & Lux conveyed to complainant its water rights in consideration of reduced or rebated water rates. The fact is, that complainant took its waters from the river without paying anyone a cent for the right of diverting them, and this appears clearly from the testimony of Merritt, its secretary, who swore *that for fifteen or twenty years the complainant had been taking water from the river, openly, claiming the right to do so, adversely to everybody, and without asking anyone's permission to do so* (Rec. p. 344). The one thing most apparent from these contracts between Miller & Lux and the canal company is that Miller & Lux *have been therein extremely careful not to convey to the canal company* any of its riparian, or other, rights to the waters of the San Joaquin River. The most that any of these contracts do is to recognize the prior or existing right of the canal company to take certain amounts of water from the river, but they fall far short of being grants of any water rights, and most certainly not one of them pretends to grant any water right in consideration of any reduced water rate by the canal company to Miller & Lux. Furthermore, there is no evidence in this record as to what the alleged riparian rights of Miller & Lux ever were,

or are, to the waters of this river. Such riparian rights, if any they have, would be the right to irrigate their lands riparian to the river, with water from the river, and such right is limited to a reasonable use, subject to a like right of reasonable use of the river water on lands owned by others and riparian to the river. A riparian right to water in a stream is a a right appurtenant and attached to some particular parcel of land that borders, and because it borders, upon the stream, and there is absolutely not a word in these contracts conveying or granting to the canal company the riparian rights appurtenant to any land bordering on the San Joaquin River that Miller & Lux may have owned, and there is nothing in the record to show what riparian lands Miller & Lux owned, or whether such lands lie above or below the point of diversion of water from the river by the canal company. In short, this record ~~does~~ not disclose that Miller & Lux have by any contract, or in any manner, agreed that the canal company should have the exclusive right to take from the river any water that Miller & Lux were entitled to have applied to the irrigation of *any of its riparian lands*. The Court will bear in mind that the claim of complainant that it paid Miller & Lux \$188,263.00 for water rights is based upon the device of estimating that Miller & Lux have by reason of the water rate rebates allowed them by said contracts saved that amount of money from the year ending June 30, 1887, to year ending June 30, 1903, viz., for sixteen years (Rec. pp. 111, 344, 345). But why should the calculation stop at the year 1903,

for there is absolutely no time limit in the current water rate rebate contracts between complainant and Miller & Lux? So far as these contracts show, the discrimination in favor of Miller & Lux can go on forever, and, this being so, the amount so paid in rate rebates for the water right would go on increasing in course of time to \$10,000,000.00. This consideration alone, which is referred to by the Master, shows most conclusively that said discriminating rate contracts were not and could not have been made in consideration of any water right.

In considering this entire question and these contracts by which Miller & Lux were furnished water for cultivated lands at rates less than those charged to others, and at rates less than those fixed by the supervisors and complained of in this suit, it should be borne in mind that, since December 1877, Miller & Lux have had complete control of the capital stock of the complainant canal company and of its board of directors; that Henry Miller and Le Roy J. Nickel are, respectively, president and vice-president of Miller & Lux, *and also of complainant canal company*; that C. Z. Merritt is secretary of both corporations; that a majority of the directors of each corporation appear to be the same persons and to consist of Henry Miller, J. Leroy Nickel and their relatives and friends; that Hammatt is engineer for both concerns, and had charge of making up complainant's bill, Exhibit 27, against his other employer, Miller & Lux, for irrigating its lands (Rec. pp. 410 to 413).

Now, in regard to complainant's claim that the rebates from water rates under these contracts to Miller & Lux and amounting, it is claimed, to \$188,-263.00, were made in consideration of grants of water rights to complainant or its predecessors, by Miller & Lux as a riparian owner, or by anyone, we submit that the Master was fully justified in finding that they were not made upon any such consideration, for it is obvious upon examination of the contracts that the rate rebates were not made for any such consideration, for not one of such rebate agreements purports to convey any water right from Miller & Lux; *nor do any of such agreements in any manner provide that such rate rebates are, or shall be, given in consideration of any water right.*

The fact clearly appears from the record that, prior to December, 1877, when it first got complete control of complainant, Miller & Lux were granted rebates in consideration solely of the rights of way which they granted the canal company by contracts, Exhibits 6 and 7, and that the subsequent discriminating contracts in favor of Miller & Lux were made solely because they had acquired a majority of complainant's stock and of its directors. We here call the Court's attention to the fact that the Master and Circuit Court have allowed complainant a valuation of \$144,119.00 for its rights of way (Rec. p. 87). After Miller & Lux so in 1877 acquired control of complainant, they operated the canals as though they, and not complainant, owned them, for we have the testimony of Rouse, one of the complainant's superintendents, that Miller & Lux would

take water from the canal whenever they wanted it and without asking for it, as others were required to do (Rec. pp. 649, 650); also that the drainage waters from the canal were delivered to Miller & Lux without payment, although others could not get any water, or drain water unless they paid for it (Rec. pp. 647, 648, 649).

**NEITHER COMPLAINANT NOR ANY OF ITS PREDECESSORS EVER PAID \$166,666.00, OR ANY SUM, OR CONSIDERATION, TO MILLER & LUX, OR TO ANYONE, ON ACCOUNT OF ANY WATER RIGHT, NOR WAS THE DISCRIMINATION CONTRACT, EXHIBIT 10, AS TO SO-CALLED SURPLUS WATERS, MADE IN CONSIDERATION OF ANY WATER RIGHT.**

Counsel's claim as to this matter appears on page 107 of their brief, where they say in effect that complainant having been charged by the Master with \$10,000.00 as the value of the so-called surplus water which it delivered to Miller & Lux to irrigate their pasture lands free of charge under the discriminating contract, Exhibit 10 (Rec. p. 1086), that therefore complainant is entitled to have said \$10,000.00 capitalized at six per cent, making the value of such surplus waters \$166,666.00, and that such value should be credited to complainant as though it had paid it to Miller & Lux for a water right of that value.

All of this is merely an ingenious assumption on the part of counsel, for there is absolutely no evidence in the record to support any such contention. In the first place, there is no agreement and nothing in this record that any surplus water from the canal should be given Miller & Lux in consideration of any water



right. This matter was considered fully by the Master in his report, who found that this so-called waste or surplus water delivered to Miller & Lux free of charge was used by them to irrigate 20,000. acres of their pasture lands, upon which they fed thousands of their cattle; that such waters belonged to the canal company, and that complainant could not give them away free of charge to Miller & Lux, but should be charged as having received 50¢ an acre, amounting to \$10,000.00, for their use for the irrigation year. The Master's review of the evidence as to this will be found in his report (Rec. pp. 128 to 136), and fully sustains his findings that such so-called surplus waters were not delivered to Miller & Lux in consideration of any water right, or in consideration of anything other than that Miller & Lux took them because it had complete control of complainant and its directors, and hence could and did take from complainant whatever it wanted. The Master refers to and quotes from the minutes of the canal company of May 7, 1899, giving the report of the committee which was adopted and carried out by the agreement of May 18, 1899 (Exhibit 10, Rec. p. 1086), between the canal company and Miller & Lux as to so-called waste or surplus waters, and which report stated that Miller & Lux had from the beginning

“tacitly assented to the diversion of water by the canal company, \* \* \* that no written agreement was ever made on the subject, and that Miller & Lux's acquiescence would certainly be held to estop them from denying the right of the company to take water to the extent of the capacity of the canal” (Rec. p. 116).

Counsel refer to paragraph 6 of the contract of February 7, 1872 (Exhibit 7, Rec. p. 1077). This paragraph only provided that, if the canal should diminish the natural overflow of the river and its sloughs which usually occurs between April 1st and June 15th, the canal company would permit an overflow from the canal upon lands of Miller & Lux equal to that of which they had been deprived. But the evidence shows that the so-called surplus waters used to irrigate the 20,000 acres of Miller & Lux grass lands were not the waters referred to in paragraph 6 of said contract, because the testimony shows that Miller & Lux take such so-called surplus waters during the entire irrigating season from April 1st to September 1st, for the purpose of reclaiming alkali lands as well as to irrigate grass lands (Rec. pp. 131 to 134).

Furthermore, it appears from the record that both the canal company and Miller & Lux expressly admitted that the latter should pay for the irrigation of their grass, or pasture lands, with this so-called waste or surplus water. For in 1904 the canal company *fixed the price of irrigating grass lands* at seventy-five cents per acre in Stanislaus County; at fifty cents per acre in Merced County, and at thirty cents per acre in Fresno County, and for that year alone Miller & Lux paid complainant \$4,947.38 for irrigating 14,639.8 acres of grass lands (Rec. p. 449). Since then, Miller & Lux have paid complainant nothing for irrigating their grass lands, although the resolution of complainant's directors fixing said rates *has never been rescinded* (Rec. p. 450). How can complainant, in the face of this evidence, be heard

to say that it agreed to give Miller & Lux free irrigation for their grass lands in consideration of any water rights? Again, as to Exhibit 10, which was made while the testimony was being taken in former rate case as to the rates of 1896, the alleged consideration mentioned in that contract moving from Miller & Lux to the canal company had been long theretofore exhausted in contracts (Exhibits 6, 7 and 8), while as to the 350 cu. ft. of water for the outside canal there never was, nor is, a word or thing to show that Miller & Lux owned said 350 cu. ft., or that they ever gave it, or in any manner conveyed it to complainant. The simple fact is that complainant took from the San Joaquin River whatever waters it wished, whether for the main canal or the outside canal, and there is no evidence in this record that Miller & Lux ever owned any of the waters that the complainant has taken from the river. As before stated, Merritt, complainant's secretary, testified in this suit that for the last fifteen or twenty years complainant took its waters from the river, claiming the right to do so adversely to everyone and without asking anyone's permission (Rec. p. 344). But, even assuming that Miller & Lux acquired any right to the so-called waste waters for grass lands free of charge under Exhibit 10, executed on May 18, 1899, yet they wholly abandoned such right when they paid complainant for such waters in 1904, under complainant's resolution fixing the rates therefor, and such resolution has never been rescinded (Rec. pp. 449, 450).

Moreover, complainant alleges in its bill of complaint that it appropriates the waters of the river for sale

(Rec. p. 2), and it is obvious that these waters that are given free to Miller & Lux to irrigate their pasture lands cannot be in any proper sense waste or surplus waters if they can be, as they are, put to a beneficial use. Besides, appellees are charged in this proceeding with the value of the dam in the river and the canals by which those so-called waste or surplus waters are diverted from the river and distributed upon Miller & Lux's pasture lands. The uncontradicted testimony of Wangenheim is that in 1907 those waters were worth at least fifty cents an acre per year (Rec. p. 728), and the Master was fully justified in finding that complainant should be charged with having received that rental from Miller & Lux for the 20,000 acres irrigated.

Counsel's claim that this alleged free water, charged by the Master to complainant at \$10,000.00, would, if capitalized at 6%, amount to \$166,666.00 as having been paid by the canal company to Miller & Lux for riparian water rights, is a pure and unjustifiable assumption, for contract, Exhibit 10, does not convey any riparian water right from Miller & Lux to the canal company.

It thus appears that complainant's alleged water rights have cost it nothing, and, so far as the record shows, all that complainant and its predecessors ever did was to divert the water from a public stream without paying anyone consideration for the right of such diversion. Consequently, its mere right to divert the water having cost complainant nothing, it does not represent any investment of money or other thing by complainant. Such being the case, complainant is not, we claim,

entitled, in a proceeding to determine the rate it shall charge the public for the use of the water, to have the value of such alleged right of diversion included in the value of its diverting and distributing plant, because the right of diverting the water is in this instance a right to take the water of a public stream, which water no person apparently owned or claimed to own, and the exercise of which right amounted simply to taking the public waters of the State of California without any expense or investment. The right of diverting water from a stream is one thing, and the expense of utilizing such right is another. The expense of utilization has been fully covered in this case by the valuation allowed for the diverting dam, headworks and distributing canals, but to such valuation there should not be added any value for a mere right of diversion which represents no cost or investment. Section 1 of Article XIV of the Constitution of the State of California provides:

“The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law.”

The State Irrigation Act of 1885 (Appendix) contains the same provision. The word “appropriation” as so used in the State Constitution has been construed by the Supreme Court of the State of California as not referring to the act of taking or the method of acquiring water, but as meaning “devoted to”.

*Merrill v. Southside I. Co.*, 112 Cal. 426-433.

Under such construction, the State Constitution provides that the use of all water "devoted to" sale, rental, or distribution, is a public use. In its bill of complaint, complainant alleges that the waters diverted by it from the rivers have been and are furnished by it to the inhabitants of the counties of Fresno, Merced and Stanislaus, "for irrigation, sale, rental and distribution, and consequently all that complainant has done is to take, without cost, the public waters of the state and devote them to the use of the public.

We have said that the waters diverted from the river by complainant and its predecessors were public waters of the State of California, and this is undoubtedly so. It is provided by Section 1410 of the Civil Code of California that "The right to the use of running water flowing in a river or stream or down a canyon or ravine may be acquired by appropriation". Section 1422 of the same title and code provided before its amendment in 1903 (Stats. 1903, p. 397) that "The rights of riparian proprietors are not affected by the provisions of this title ", and such is still the law of the state under the decisions of its Court, notwithstanding that the amendment to said section omitted entirely all of its said provisions.

Sections 1415 to 1422 of the Civil Code provide for certain posting and other acts by a person desiring to appropriate the waters of a stream, but the performance of such acts are not necessary to such appropriation, as has been decided by the Courts of California, which have ruled that the appropriation of water is made and is complete if the water be actually taken from the

stream with the intent to appropriate it for a beneficial use and if it shall be applied to such use.

*McDonald v. Bear River etc. Co.*, 13 Cal. 220, 232;  
*Watterson v. Saldunbehere*, 101 Cal. 107, 112.

It is also the law of California that an appropriator of water obtains a good title to its use by prescription as against the riparian owner by five years open, continuous and adverse use of it. This will doubtless be admitted. The law is clearly stated in *Duckworth v. Watsonville W. Co.*, 150 Cal. 530, 531.

The result is that the waters that a person takes from any stream in California and uses for a beneficial use for five years continuously and adversely to others are public waters of the state which he is entitled to so appropriate and devote to a beneficial use. In the case at bar, complainant has, as against Miller & Lux and all other riparian owners, a prescriptive right to take the waters from the San Joaquin River, and the waters that it takes and has dedicated to public use are the public waters of the state, and it and its predecessors have taken said waters without paying any one for the right to take them. Complainant's main contention is that, the water rights should have been valued in fixing the rates because, it claims, such rights had cost it a considerable amount of money, but the record discloses, as we have seen, that such waters and water rights cost it nothing. We fail to see how complainant can be injured by omitting from the valuation upon which its rates are to be estimated a water right that has cost it nothing and represents no investment by it, for the underlying reason supporting the constitutional

guaranty that the rates shall be reasonable is that the rates shall give a reasonable return *upon the investment*, and not a return upon something that may have cost the complainant nothing and that represents no investment.

We shall hereafter in this brief also contend that, under the laws of California, waters once dedicated to the public use belong to the public and not to the water company, *irrespective of how, or at what cost, acquired*; but, aside of that question, we think the fact that these water rights cost complainant nothing and are public waters of the state, taken, devoted and dedicated by complainant solely for public use, is sufficient of itself to dispose of complainant's claim that they should be valued in this proceeding as part of its plant.

- (c) **EVEN SHOULD THE ALLEGED VALUE OF THE WATER RIGHT BE ADDED TO THE CIRCUIT COURT'S VALUATION OF COMPLAINANT'S PROPERTIES AND THE COUNTY RATES BE RAISED SO AS TO GIVE A NET ANNUAL INCOME OF SIX PER CENT UPON SUCH INCREASED VALUATION, NEVERTHELESS COMPLAINANT WOULD NOT ACTUALLY RECEIVE NOR BE ENTITLED TO RECEIVE SUCH NET INCOME OF SIX PER CENT, BECAUSE OF ITS AFORESAID DISCRIMINATORY RATE CONTRACTS WITH ITS CONTROLLING STOCKHOLDER, MILLER & LUX, BY WHICH COMPLAINANT'S NET ANNUAL INCOME UNDER THE COUNTY RATES IS DECREASED 25.13 PER CENT. UNDER SUCH STATE OF FACTS APPELLEES INSIST THAT COMPLAINANT HAS NO STANDING IN A COURT OF EQUITY TO COMPLAIN OF THE COUNTY RATES AS BEING INSUFFICIENT TO GIVE IT AN ANNUAL NET INCOME OF SIX PER CENT, FOR THE REASON THAT THE COURT CAN ONLY ENFORCE THE CONSTITUTIONAL AND STATUTORY GUARANTIES INVOKED BY COMPLAIN-**



ANT IN SO FAR AS THEY RELATE TO AN ANNUAL NET INCOME THAT IS ACTUALLY IN FACT RECEIVED OR RECEIVABLE UNDER THE PUBLIC RATES COMPLAINED OF. THE CONSTITUTIONAL GUARANTIES SHOULD BE APPLIED ONLY TO INSURE AN ACTUAL NET RETURN, FOR COMPLAINANT CAN ONLY BE INJURED AND HAVE CAUSE OF COMPLAINT BECAUSE OF DEPRIVATION OF ACTUAL MONEY INCOME. UNDER THE FACTS OF THIS CASE THE QUESTION OF THE INSUFFICIENCY OF THE RATES IS PURELY MOOT AND ACADEMIC.

This point should properly precede the argument of all other points, but it is made at this place so as to avoid unnecessary repetition of the review of the discriminatory rate contracts between complainant and Miller & Lux.

The Master and the Circuit Court found that, in considering the sufficiency of the rates attacked by complainant, it should be charged *as though* it had actually received the moneys that the rates if enforced would have returned to complainant, irrespective of the lesser rates and free water allowed by it to its controlling stockholder, Miller & Lux, under the contracts we considered under the foregoing point. In adopting this course, the Master and Circuit Court followed the rule announced in *Wileax v. Con. Water Co.*, 212 U. S. 19, and *Knoxville v. Knoxville Water Co.*, 212 U. S. 11, and other cases where the reduced rates allowed to some customers amounted to a very small part of the entire amount called for by the rates attacked. But the facts of the case at bar clearly put it in a class by itself, because of the large amount of revenue *actually lost* to complainant under its discriminatory rate contracts with Miller & Lux. That this loss amounts to 25.13 per cent of the total income that complainant *should have*

*collected*, according to the findings of the Master approved by the Circuit Court, appears from the following:

The total acreage of lands irrigated by complainant during the irrigation year under consideration by the trial Court and the irrigated acreage owned by Miller & Lux and by persons other than Miller & Lux respectively were as follows:

|                                    |            |       |
|------------------------------------|------------|-------|
| Miller & Lux cultivated lands..... | 58,952.92  | acres |
| “ “ “ grass pasture lands.....     | 20,000.00  | “     |
| Other consumers' lands.....        | 34,050.70  | “     |
| <hr/>                              |            |       |
| Total .....                        | 113,003.62 | “     |

(Rec. pp. 140, 566, 567, 451, 452, 582, 583, 1192 to 1197.)

It thus appears that complainant irrigated for Miller & Lux 69 per cent of the entire amount of land irrigated. For the irrigation of these 113,003.62 acres of land complainant actually collected \$107,409.18, of which \$51,480.33 was paid by Miller & Lux and \$55,928.85 by other consumers (Rec. pp. 626, 1192 to 1197). So that, while the Miller & Lux irrigated lands were 69 per cent of the entire irrigation, yet they actually pay therefor less than one-half of the entire gross revenue actually received by complainant from land irrigated. This is so solely because of the aforesaid discriminatory rate contracts, Exhibits 7 and 8, by which complainant has agreed to irrigate, without limit as to time, the cultivated lands of Miller & Lux at rates less than the county board rates it complains of in this suit, and because of the contract, Exhibit 10, by which complainant has agreed, without limit as to time, to irrigate the grass pasture lands of Miller & Lux free of charge.

These contracts are in force and under them complainant *does not and cannot* collect the revenue that the county board rates would produce.

The Master and Court found that complainant should, for the year in question, be charged as though it had received \$136,697.35. This amount was made up of the following:

|  |              |
|--|--------------|
| Collections that complainant reported as actually made,                    |              |
| Sale of water (including \$1,163.97 carriage charge against Miller & Lux), | \$108,324.16 |
| Interest and discount,   | 163.48       |
| Rent   | 751.50       |
|  | <hr/>        |
|  | \$109,239.14 |

To this was added by Master and Court the following, because of the discriminatory water rate contracts with Miller & Lux:

|   |              |
|---|--------------|
| Difference between special rate to Miller & Lux and board rate <i>re</i> cultivated lands, under contracts, Exhibits 7 and 8,                                       | \$ 4,108.65  |
| Further amount payable by Miller & Lux for irrigation of 14,111.65 acres \$14,512.53, less the above water carriage charge of \$1,163.97 under contract, Exhibit E, | 13,349.56    |
| For irrigation by Miller & Lux of 20,000 acres of pasture land under contract, Exhibit 10,  | 10,000.00    |
|   | <hr/>        |
| Total,  | \$136,697.35 |

(Rec. pp. 157, 158.)

Of the said total of \$136,697.35 that complainant should have collected, the sum of \$27,458.21, or 25.13 per cent, was not collected by it from its controlling stockholder, Miller & Lux, because of the said contracts giving them rates lower than the county rates for their cultivated lands and free water for their pasture lands. The evidence fully sustains, as we have before seen, the finding of the Master and Court that those contracts were not made in consideration of the conveyance of any water right by Miller & Lux to complainant, as claimed by counsel. The true considerations for those contracts were, as we have seen, the granted rights of way and for which the Master and the Court have allowed complainant the ample and unattacked valuation of \$144,119.00 (Rec. p. 87). Then the clear result of those still continuing contracts is that complainant *thereby donates* to Miller & Lux 25.13 per cent of the annual revenue which it should receive from the sale of the water, and the result is that the total net revenue under the rates *is not actually receivable* by complainant *and it is not entitled to receive them* because it has contracted to allow Miller & Lux to retain 25.13 per cent of the same. Under such a state of facts, we claim that complainant can have no standing in a Court of equity to complain that the county rates are insufficient to give it an annual six per cent net income, for the reason that the only ground for relief that complainant can have, or that the court can properly give, must be in respect to net income that complainant is *actually entitled to receive* under the rates. For it must be obvious that complainant cannot be damaged unless the income *actually receivable* under

the rates is insufficient. But complainant having put it out of its power to receive 25.13 per cent of the income that the rates, if enforced, would yield, cannot claim that the rates are insufficient to give it the income which it claims has been guaranteed it by the constitution and the statute, for such guarantees relate only to the *entire income* yielded by the rates enforced as against all consumers. If complainant can thus donate to its controlling stockholder 25 per cent of the receivable income under the rates, it can with equal propriety donate 99 per cent or even its entire income and still complain of the insufficiency of the rates to give it an adequate income. If complainant is granted the relief it asks in this case, then the result is that, while it would continue to donate 25 per cent of its revenue to Miller & Lux, the rates of all water consumers other than Miller & Lux would be raised for the purpose of giving it a six per cent actual income. The Court will, we think, readily see that the condition presented by this case is anomalous and, so far as we can ascertain, unprecedented. Since the jurisdiction and power of the Court can be invoked only to protect complainant as to the net income *actually receivable by it under the rates complained of*, and as complainant has by its contracts with Miller & Lux, the owner of 80 per cent of its stock, deprived itself of the right to collect from them 25 per cent of the revenue yielded by the rates, we ask a ruling of this Court to the effect that *the actual income* of complainant under the rates complained of is not, by reason of said rebate rate contracts, properly involved in this suit, and that hence complainant is entitled to no relief and that the decree of the Circuit

Court dismissing the bill of complaint should be affirmed. We are not, in this suit, asking the Court to decide any of said discriminatory rate contracts to be invalid, for clearly, this Court would have no power to do so. That is a matter in which the minority stockholders in complainant corporation may possibly be concerned. But since those contracts put it completely out of complainant's power to collect 25 per cent of the income it would otherwise receive under the county rates complained of, we claim that it can have no standing in Court to complain that the county rates are insufficient to give it a net return of six per cent. The case presented by this record is not really one that relates to the enforcement on complainant's behalf of any constitutional or statutory guaranty as to its income under the county board rates complained of, but is one showing only the almost complete absorption and the absolute domination of complainant by its controlling stockholder, Miller & Lux.

**(d) BUT IRRESPECTIVE OF WHETHER OR NOT COMPLAINANT PAID ANY SORT OF CONSIDERATION FOR ITS WATERS, OR WATER RIGHTS, AND IRRESPECTIVE AS TO HOW OR IN WHAT MANNER THE SAME MAY HAVE BEEN ACQUIRED, THEY ARE, WITHIN THE MEANING AND INTENT OF SECTION 1, ARTICLE XIV OF THE CONSTITUTION OF CALIFORNIA AND OF THE IRRIGATION ACT OF 1885 (Stats. 1885, p. 95), APPROPRIATED TO PUBLIC USE IF (AS IS ADMITTED IN THE CASE AT BAR) THEY ARE DEVOTED TO DISTRIBUTION AND SALE TO THE PUBLIC, AND BEING SO DEVOTED, OR APPROPRIATED, TO A PUBLIC USE, NEITHER THE WATER NOR THE RIGHT TO ITS USE (WHICH CONSTITUTES THE SO-CALLED WATER RIGHT) CAN, IN A PROCEEDING TO FIX THE WATER RATE TO BE PAID BY THE PUBLIC UNDER SAID PROVISIONS OF THE STATE CONSTITUTION AND IRRIGATION**

**ACT, BE VALUED, OR INCLUDED IN THE VALUATION OF COMPLAINANT'S PLANT USED AND USEFUL IN THE DIVERSION AND DISTRIBUTION OF SUCH WATER TO THE PUBLIC, FOR WATER RIGHTS ONCE DEDICATED TO THE USE OF THE PUBLIC ARE NOT THE PROPERTY OF THE WATER COMPANY BUT OF THE PUBLIC CONSUMERS, AND WHERE WATER RIGHTS HAVE BEEN DEDICATED TO THE IRRIGATION OF THE LANDS OF THE PUBLIC THEY HAVE BECOME ATTACHED TO THE LANDS AND NOT TO THE WATER SYSTEM OF THE WATER COMPANY.**

Counsel for appellant have devoted pages 23 to 111 of their brief in opposition to the above proposition. Counsel have also cited many cases as sustaining their position, but an examination of them will show that in none was the question under consideration either presented or decided.

*People v. Stephens*, 62 Cal. 209, 233 (1882), was a proceeding instituted on behalf of the People of the State to enjoin a water company from excavating the streets of the Town of Woodland for the purpose of supplying the town and its inhabitants with water. The Court decided that the provisions of Section 19 of Article XI, and of Sections 1 and 2 of Article XIV of the Constitution of 1879 of the State of California, declaring the use of all water heretofore or hereafter appropriated for sale, rental, or distribution to be a public use, and permitting a water company to lay pipes in the streets of a municipality to supply it and its inhabitants with water, and directing that the water rates should be fixed annually by the governing body of the city or town, were self-executing without any action by the legislature, and that is all that the case decided. In that case, no question was presented or

decided as to the right of a water company devoting its waters to public use to have its water right valued in a proceeding to fix its water rates, but the case is authority supporting appellees' claim that, under Section 1 of Article XIV of the said Constitution, waters appropriated by a water company for sale, rental, or distribution to the public, are thereby devoted to the use of the public, subject to the regulation and control of the state. In connection with this case of *People v. Stephens*, where the Court decided that the constitutional provisions as to fixing rates for water supplied to cities and towns were self-executing, we direct attention to the fact that the constitutional provision was not self-executing where water was supplied *outside of cities and towns*. Accordingly to provide for such case, the State Irrigation Act of March 12, 1885, was enacted by the legislature (Appendix).

*McCrary v. Beaudry*, 67 Cal. 120 (1885), was an application by an inhabitant of a city for a writ of mandate to compel the defendant to furnish petitioner with water, it appearing that defendant had appropriated water for distribution and sale, and that he had acquired and was exercising the right to collect rates for the use of it.

There was in this case no question presented or decided as to the valuation of a water right, but appellees claim the decision to be an authority for the proposition that, where water has been once devoted to public use by a water company, or by any person, the right to its use is ever after solely in the public and not in the water company, or person, who has made such ap-



propriation, or devotion, of the water to the public use, for the Court says (p. 121):

“Whenever water is appropriated for distribution and sale, the public has a right to use it. That is, each member of the community, by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it, in a reasonable manner. Water appropriated for distribution and sale is *ipso facto* devoted to a public use, which is inconsistent with the right of the person so appropriating it to exercise the same control over it that he might have exercised if he had never so appropriated it.” (Italics ours.)

Counsel at page 30 of their brief cite the cases of:

*Fresno etc. Irrigation Co. v. Rowell*, 80 Cal. 114;

*Fresno etc. Irrigation Co. v. Dunbar*, 80 Cal. 530;

*San Diego Flume Co. v. Chase*, 87 Cal. 561;

*Clyne v. Water Co.*, 100 Cal. 310;

*Balfour v. Fresno etc. Irrigation Co.*, 109 Cal. 221,

in which cases the only questions decided were that the landowners had a right to the water and that the irrigating companies had a right to payment for water pursuant to the agreements made in each instance for the supply of a certain amount of water at a certain rate.

As to these five cases, counsel say (p. 31):

“The practical effect of these decisions was that a water company had a right to contract with an individual as to the amount he should pay in order to entitle him to receive water in the absence of any rate fixed by the public authorities.”

Our reply to this is that in not one of these five cases was the question either raised or decided as to whether

or not the water company and irrigator had a right to agree upon a rate in the absence of a rate fixed by any public authority, and in none of said cases was the said Irrigation Statute of March 12, 1885, even referred to. We refer to counsel's comment upon those five cases, not in support of any contention that a water company and an irrigator cannot make a valid contract as to the water rate in the absence of a rate by the public authority, but simply to show that they are entirely immaterial to any issue in this case.

*People v. Elk River M. & L. Co.*, 107 Cal. 221, was a suit by the people of the state on behalf of a water company supplying a town with water, to enjoin the defendant operating a mill on the banks of the stream from polluting the water with sawdust and drainage. The Court refused to grant an injunction on the ground that the defendant as a riparian owner on the stream had acquired such use of it before the water company had acquired any right to the waters; that such use was a reasonable use, and could not be taken away by the water company without compensation, and that Section 1 of Article XIV of the State Constitution making the use of water for sale, rental or distribution a public use, was not intended to take such water away from a riparian owner without compensation. That is all that that case decided, and it has no bearing upon the questions in the case at bar. In the case at bar, complainant is not the riparian owner of any water and does not claim to be.

*San Diego Water Co. v. San Diego*, 118 Cal. 556, 567, was a rate-fixing case in which the Court in the course

of its opinion stated in effect that, when a water company had devoted its water to public use, "it ceased to own it in the same sense in which a man is said to own his horse or his farm," but that the state is bound to make just compensation to the water company for such devotion by it of its water to public use "by requiring the municipal authorities to fix just and reasonable rates at which the water is to be furnished to and received by the consumers." In this case no question was presented or submitted to the Court as to the right of the water company to have the value of its water right included in the calculation of the rates to be charged, and the Court did not undertake to decide any such question.

*Thayer v. Cal. Development Co.*, 164 Cal. 117, has no application to the case at bar, because it related solely to the right of a person to be supplied with water for irrigation by the defendant, which the Court found (p. 131) *had not dedicated its waters to public use* within the meaning of Article XIV of the State Constitution, but had reserved them for use upon specific lands. This case is but one of the line of cited California decisions (p. 135) holding that, where water has been dedicated to use upon specific lands, such use is a limited private use, and not a public use subject to regulation by the state under the above constitutional provisions. In the case at bar, it is admitted that complainant's waters have been dedicated to the public use and that such use is subject to regulation by state authority.

*Wilterding v. Green* (Idaho), 45 Pac. Rep. 134, was a proceeding for mandamus to compel a water company to supply plaintiff with water for irrigation. The only question decided by the Court was that the demurrer to the complaint should have been sustained on the ground that the complaint did not allege facts sufficient to show that plaintiff's tender of the water rate was a reasonable tender. What the Court there said as to the Colorado case of *Wheeler v. Irrigating Co.*, 10 Colo. 582, was not necessary to the decision and was mere *dicta*.

*Tyndale Palmer v. Southern Cal. Mountain Water Co.*, Decision No. 418 by the Railroad Commission of California, in no manner involved the question as to whether or not a water company was entitled to have the value of any water right included in the valuation of its plant in a proceeding to fix the rates to be charged the public users of the water. The purport of the decision is that the "appropriation" of water under Sections 1410 to 1422 of the Civil Code of California has reference to the taking or acquiring of the water, while "appropriation" of water under Article XIV of the State Constitution has reference to its devotion or dedication to public use by the person who may have acquired it.

**THE FOLLOWING AUTHORITIES SUPPORT THE DECISION OF THE CIRCUIT COURT IN THE CASE AT BAR, TO THE EFFECT THAT COMPLAINANT WATER COMPANY HAVING DEDICATED ITS WATER RIGHTS TO THE USE OF THE PUBLIC HAS FOREVER DEDICATED THEM TO A PUBLIC USE AND IS NOT ENTITLED TO HAVE THEM VALUED AS PART OF ITS PLANT, OR OTHERWISE, IN A PROCEEDING TO FIX THE RATES TO BE CHARGED THE PUBLIC.**

*San Diego etc. Co. v. National City*, 74 Fed. 79;

*Leavitt v. Lassen Irrigation Co.*, 157 Cal. 82;

*Lassen Irr. Co. v. Leavitt*, 157 Cal. 94;

*San Diego Water Co. v. San Diego*, 118 Cal. 556,  
567;

*Boise City I. & L. Co. v. Clark*, 131 Fed. 414.

*San Diego etc. Co. v. National City*, 74 Fed. 79, was a suit by the water company to have adjudged void as unreasonably low and confiscatory under the guaranties of the Constitution of the State of California and the fourteenth amendment to the Constitution of the United States the water rates fixed by the city board of trustees,

“and that the board of trustees be ordered and required to adopt a new and reasonable rate of charge, and that it be decreed that complainant corporation is entitled to charge and collect for ‘water rights’ at reasonable rates as a condition upon which it will furnish water to the inhabitants of the municipality for purposes of irrigation, independent of the rates fixed by the board of trustees for water sold and furnished by the company” (p. 80). (Italics ours.)

It is thus seen that one of the material issues in the case was the right of the water company to charge and collect in addition to the rates a further sum for “water rights.” The Circuit Court decided that no charge could be made or collected for the “water rights”, and in the course of his opinion Judge Ross said as to that matter:

“One of the objects of the present suit is to obtain a decree establishing the validity of the claim of the complainant to exact a sum of money, in addition to an annual charge, as a condition on which alone the complainant will furnish consumers of water for irrigation purposes, other than those to whom it had furnished it for such purposes

prior to December 18, 1912. And the contest that arose between the consumers and the company over this charge for a so-called 'water right', and the refusal of the municipal authorities of National City to allow that charge in respect to acreage property within the city limits, is one of the principal causes of the present suit. *It does not change the assence of the thing for which the complainant demands a sum of money to call it a 'water right', or to say, as it does, that the charge is imposed for the purpose of reimbursing complainant in part for the outlay to which it has been subjected.* It is demanding a sum of money for doing what the constitution and laws of California authorized it to appropriate water within its limits, conferred upon it the great power of eminent domain, and the franchise to distribute and sell the water so appropriated, not only to those needing it for purposes of irrigation, but also to the cities and towns, and their inhabitants, within its flow, for which it was given the right to charge rates to be established by law, and nothing else. *No authority can anywhere be found for any charge for the so-called 'water right.'* The state permitted the water in question to be appropriated for distribution and sale for purposes of irrigation, and for domestic and other beneficial uses, conferring upon the appropriator the great powers mentioned, and compensating it for its outlay by the fixed annual rates. *The complainant was not obliged to avail itself of the offer of the state, but, choosing, as it did, to accept the benefits conferred by the constitution and laws of California, it accepted them charged with the corresponding burden.* Appropriating, as it did, the water in question for distribution and sale, it thereupon became, according to the express declaration of the constitution, charged with a public use. 'Whenever', said the Supreme Court of California in *McCrary v. Beaudry*, 67 Cal. 120, 121, 7 Pac. 264, 'water is appropriated for distribution and sale, the public has a right to use it; that is,

each member of the community, by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it in a reasonable manner. Water appropriated for distribution and sale is ipso facto devoted to a public use, which is inconsistent with the right of the person so appropriating it to exercise the same control over it that he might have exercised if he had never so appropriated it.' To the same effect is *People v. Stephens*, 62 Cal. 209; *Price v. Irrigating Co.*, 56 Cal. 431." (Italics ours.)

We claim this decision by Judge Ross to be squarely decisive in support of the proposition contended for by us in the case at bar, viz.: that a water company having under the constitution of California dedicated its water to public use is not entitled to have any value of its alleged water rights included in the valuation of its plant in a proceeding to fix the rates it shall charge the public, for it is evident from this decision that, if a water company cannot require the rate board to allow a charge for a "water right" for the reason that its "water rights" have been dedicated to the public, then neither can it have the right to have the "water right" valued as part of its plant in the proceeding by the board to fix the annual rates, for so to do would be in effect, charging and collecting a sum for a "water right" and doing indirectly what the Court decided it had no right to do.

In regard to this case counsel say at page 32 of their brief that "the company did not claim that it owned certain water rights upon which the rates fixed by law should give it an adequate return", but contended that it should be permitted not only to collect the rates fixed, but also an additional sum for the use of the water.

Counsel is mistaken as to this, for it is evident from the whole case that the water company not only claimed to own the alleged water right, but that it also contended that it was entitled to charge therefor *because it had expended money in acquiring the water right*. That this is so we think clearly appears from that portion of the opinion above quoted, reading as follows:

“It does not change the essence of ~ thing for which complainant demands a sum of money to call it a ‘water right’, or to say, as it does, that the charge is imposed for the purpose of reimbursing complainant in part for the outlay to which it has been subjected” (p. 86). (Italics ours.)

We thus see that the Circuit Court in this case squarely decided the very question at issue in the case at bar, viz.: that the water company having dedicated its water to public use could not charge for the water right, or right to use the water, on the ground that it was entitled to reimbursement for its outlay in acquiring the water right.

This case of *San Diego etc. Co. v. National City*, was appealed to this Court, but the question as to the right to charge for a “water right” was not decided, because, as stated in the opinion of Mr. Justice Harlan, a decision of that matter was not necessary to a disposition of the case (174 U. S. 739).

In *Boise City L. & L. Co. v. Clark*, 131 Fed. 414, a water-rate case, the Circuit Court of Appeals affirmed the decision of Judge Ross in *San Diego L. & T. Co. v.*



*National City*, 74 Fed. 79, holding that the constitution of Idaho was substantially the same as that of California in relation to water dedicated to the public use, and that the right to collect compensation for the use of such water was a franchise that could not be exercised except by authority of or in the manner prescribed by law, and therefore that certain perpetual contracts for furnishing water at less than the rate fixed by public authority were void, and that in a proceeding to determine the reasonableness of the public rates attacked in the suit, the Court should disregard such discriminating rate contracts, and consider the public rates attacked as alone applicable.

In their attack upon the decision of the Circuit Court in the said case of *San Diego etc. Co. v. National City*, 74 Fed. 79, counsel have cited and discussed in their brief (pp. 42 to 54) the following cases:

*Lanning v. Osborne*, 76 Fed. 319;

*S. C. Osborne v. San Diego L. & T. Co.*, 178 U. S. 22;

*San Diego Flume Co. v. Souther*, 90 Fed. 164;

*San Diego Flume Co. v. Souther*, 104 Fed. 707;

*Souther v. San Diego F. Co.*, 112 Fed. 228;

*Fresno Canal Co. v. Park*, 129 Cal. 437;

*Stanislaus W. Co. v. Bachman*, 152 Cal. 716;

*Imperial Water Co. v. Holabird*, 197 Fed. 4,

and counsel apparently argue that the decision of Judge Ross in 74 Fed. 76 was contrary to the views of the Supreme Court of California in *Fresno Canal Co. v.*

*Park*, 129 Cal. 437, and in the other California cases referred to by them.

On the contrary, we deny most emphatically that the said decision of Judge Ross as to the right to charge for a water right was in any manner involved or decided in any of the above cases in the sense involved in the case at bar. The question presented and decided in those cases was not the right of a water company to charge for a water right in addition to the annual water rate, but was the right of a water company to make a contract rate with an irrigationist, or other consumer, in the absence of a rate by the rate board, or in excess of the rate made by the rate board. It is true that some of the decisions of the Circuit Courts as to that matter were at variance with those of the Supreme Court of California as declared more especially in *Fresno Canal etc. Co. v. Park*, 129 Cal. 437, which held that, until the maximum rates should be fixed by the rate board under the State Irrigation Act of 1885, the water company and water user could contract as to the rates. However, even admitting such variance to have existed between the decisions of the Circuit Court and State Court, yet the real question at issue in those cases, viz.: the right of the water company and water user to contract as to the rate in the absence of a rate by state authority or within the maximum of the public rate is not the question involved in the case at bar, and is in no manner at variance with the decision of Judge Ross in *San Diego etc. Co. v. National City*, 74 Fed. 76. As to the question presented in the case at bar,

THE SUPREME COURT OF THE STATE OF CALIFORNIA HAS DECIDED IN THE CASES OF LEAVITT v. LASSEN, 157 Cal. 82, AND LASSEN IRRIGATION CO. v. LONG, 157 Cal. 94, THAT A WATER COMPANY WHICH HAS APPROPRIATED (DEDICATED) ITS WATERS TO PUBLIC USE CAN HAVE THEREAFTER AS BETWEEN ITSELF AND THE PUBLIC NO PRIVATE RIGHT TO THE WATER, CAN GIVE NO PREFERENTIAL RIGHTS TO THE WATER, AND IS BUT THE PURVEYOR OF THE WATER AND THE INSTRUMENTALITY FOR ITS DISTRIBUTION TO THE PUBLIC.

In *Leavitt v. Lassen Irrigation Co.*, 157 Cal. 82, the plaintiff had been the owner of an irrigation water system which appropriated waters from a river in the State of California for the purpose of sale, rental and distribution to the public. Plaintiff also claimed that, by means of the same canals and ditches, he had made a private appropriation of waters for use upon his individual land. Subsequently, plaintiff sold his water system to defendant, but in selling reserved to himself the prior and perpetual right to take from the system a sufficient quantity of water to irrigate his individual lands, free of charge. The defendant water company refused to allow plaintiff to take water under such reservation. In sustaining defendant's refusal the Court said (p. 85):

"Treating Leavitt's appropriation as being wholly and entirely for public use he, the owner of the system, was but an *instrumentality* for the distribution of the waters which he gathered to such members of the public as might apply for them and pay to him the legal charge for the service that he rendered. As the *agent of such a public use*, he had no power whatsoever to reserve for himself for his private purposes any part of this water. If he could reserve a part, he could reserve all, and thus, by his *ipse dixit*, convert a

*public use into private ownership, or, if he could reserve a part for himself, he could with equal authority give away parts of the supply to others, and by this method destroy what the constitution itself has declared shall forever remain a public use."* (Italics ours.)

It also appeared that, after the water system had been dedicated to public use, it was at one time owned by one Purser who had contracted with Elledge to give her from the system a prior right to irrigate certain land at one dollar per acre per year annually. Plaintiff as assignee of Elledge sought to enforce this contract against the water company. The Court refused to enforce it, holding it to be an illegal preferential contract and an unlawful attempt to convey a perpetual private water right out of water rights that had been dedicated to public use, the Court saying (p. 88):

"Waiving all minor objections, had Purser the power so to burden his public trust with this perpetual private right? Purser, it is to be remembered, held all of these waters as an appropriator for sale, rental, and distribution under the constitution of 1879. *He was but the purveyor of this public use*, the agent in the execution of this public trust. If, by any method, however devious, there can be carved out of this public trust such a private right, it must obviously result in the destruction of the public use itself." (Italics ours.)

In *Lassen Irrigation Co. v. Long*, 157 Cal. 94, the Court decided that no one could acquire by contract any permanent preferential right to the use of water that had been dedicated to public use.

We claim, in support of the decision of the Circuit Court in the case at bar, that the Supreme Court of

California has in the case of *Leavitt v. Lassen Irrigation Co.*, *supra*, definitely decided that, after water, or water rights, have once been by a water company appropriated, that is, dedicated, to public use by them for sale, rental and distribution to the public, such dedication to public use deprives the company of any private right or ownership in the waters or water rights, and that, as to them, the company has become and thereafter is but, in the language of the Supreme Court of California, the "purveyor" of the water and "instrumentality" for its distribution to the public, and that, in return for such dedication to public use, the state has given it the franchise or right to charge the public such reasonable rates as the authorized rate boards may fix, or at contract rates not less than the board rates. The learned judge of the Circuit Court fully considered these California cases in his opinion in the case at bar (Rec. p. 220) (191 Fed. 875, 893).

Counsel claim that the Colorado cases of *Wheeler v. Northern Irr. Co.*, 10 Colo. 582, and *Wyatt v. Larimer*, 18 Colo. 298, referred to in the opinion of the judge of the Circuit Court in the case at bar, are not in point, because, they say, that the constitution of the State of Colorado in effect makes a water company a "common carrier" of the public waters of that state, while the constitution of California does not. But, under the decision of the Supreme Court of California in *Leavitt v. Lassen Irrigation Co.*, *supra*, we fail to see any difference between the constitutions of Colorado and California, since in that case the water company in California, after having dedicated its water

to public use, is but the "purveyor" of the waters and the "instrumentality" for distributing them to the public. The only difference between the constitutions of the two states is that in Colorado the constitution by force of its own authoritative declaration makes all the waters in the state public waters, while the constitution of California leaves the question of public ownership to the election of the person or corporation owning the water or water rights, since under Article XIV of the California constitution only those waters are for public use that have been appropriated, that is, dedicated, to public use by offering them for sale, rental or distribution to the public. *But after such dedication to public use in California, there is in fact and in legal effect no difference between the constitutions of the two states.*

Further, in support of his decision, the judge of the Circuit Court in his opinion in case at bar gives the following cogent reasons in support of his ruling that the water right, that is, the right to use the water, once dedicated to the public use, ceases to be the property of the water company and becomes the property of the public, represented by the consumers who alone own the exclusive right to the beneficial uses of the water for irrigation of their lands and domestic purposes (Rec. p. 222):

"In these cases the theory that the irrigation company is an intermediate agency in the execution of a public trust is necessarily based upon the doctrine that the right to appropriated water is attached to the land. The company cannot at the same time be principal and agent. It cannot own the water or the right to appropriate and sell it,

and at the same time be the agent of the public in appropriating it for a public use. The logical relationship of such a company to its appropriated water is that of agent of the owner of the land in diverting and bringing the water to the land for which it has been appropriated. But it is immaterial whether the company is deemed to be the agent of the public in diverting and carrying the water owned by the public to the consumer who owns the right to its beneficial use, or the agent of the consumer in diverting and carrying the water to his principal for a beneficial use. In either case, while the carrier is entitled to be paid for his services as a carrier a reasonable compensation under such regulations as the law may prescribe, he is not the owner of the water carried or the water right created by its diversion, and he cannot compel the consumer to purchase it, and to pay for its use, either in the way of an annual or other rate upon its supposed value as a property right. One of the methods suggested by the complainant for estimating the value of its alleged water right was upon the basis that the value of the right to have water to irrigate land may be measured by the excess of the value of the land with such a right over that which it possessed without such a right, less the expense incurred by the land-owner and the canal company in introducing the irrigating system. By this method the following estimate was obtained: The value of the land without water was \$855,312. To bring the land under irrigation, the land-owners had constructed lateral ditches costing \$162,000, making a total of \$1,017,312 as the investment of the land-owners. The complainant's irrigation works cost \$1,042,940.05, making a combined expenditure on the part of the land-owners and complainant of \$2,060,252.05. The value of the land with water was estimated at \$4,122,210. Deducting from this amount the combined expenditure of \$2,060,252.05, and we have as the value of the water upon the land the sum of

\$2,061,957.95. This sum divided in half would be \$1,030,978.97, which would represent the increased value of the land upon the land-owners' investment, and also the increased value upon the canal owner's investment—that is to say, the sum of \$1,030,978.97 for each—and accordingly this sum is claimed by the complainant as the value of its water right. This method of working out a water right for the complainant and fixing its value is plausible, but not sound. It assumes that the irrigation company has obtained a partnership interest in the land irrigated, when none has been secured by contract or provided by law. As well might a railroad company in estimating the value of its property for rate purposes add to the value of its railroad property the valuation for a share or interest in the increased value of the land through which the railroad has been built, and to the owners of which it distributes merchandise as a carrier. This method of valuation of a water right discloses, however, its real basis and character; to be of substance and value it must be attached to the land and be a part and parcel of that interest. What Mr. Justice Henshaw said in the *Leavitt* case with respect to a private right of service from the carrier is equally applicable to such a water right: 'If by any method, however devious, there can be carved out of this public trust such a private right, it must obviously result in the destruction of the public use itself.' This theory of the relation of the carrier to the water right as an intermediate agent is in accord with the law of beneficial use prevailing in all the western states where the right of appropriation is derived from Act Cong. July 26, 1866, c. 264, 14 Stat. 251, and is there limited to some useful or beneficial purpose. As said by Mr. Justice Field in *Atchison v. Peterson*, 20 Wall. 514 (22 L. Ed. 414): 'The right to water by appropriation is limited in every case in quantity and quality by the uses for which the appropriation is made.' This was said with respect to the use of water for mining purposes, but in the subsequent



case of *Bacey v. Gallagher*, 20 Wall. 682, 22 L. Ed. 452, the Court held that the views and rulings made in the case of *Atchison v. Peterson* 'are equally applicable to the use of water on the public lands for the purposes of irrigation.' To the same effect is the desert land act (Act, March 3, 1877, c. 107, 19 Stat. 377) (U. S. Comp. St. 1901, p. 1548), where it is provided that the right to the use of water on desert land 'shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation.' The Civil Code of California provides in Section 1411, with respect to water rights acquired by appropriation. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases.' Section 8, Act Cong. June 17, 1902, c. 1093, 32 Stat. 390 (U. S. Comp. St. Supp. 1909, p. 600), commonly called the 'Irrigation Act,' provides that: 'The right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis and measure and limit of the right.' The same provision has been incorporated into the laws of most of the western states, not, however, as new legislation, but as the established definition of a water right under the acts of Congress and the constitutional provisions of the states declaring that the use of appropriated water is a public use. The right of diversion is accordingly limited to the beneficial use made by the consumer. *Anderson v. Bassman* (C. C.), 140 Fed. 14; *Wiel on Water Rights in the Western States* (3d Ed.), § 478. The complainant in this case claims to have acquired by prescription against all riparian owners and by appropriation against the world the right to divert from the San Joaquin river the quantity of water which the evidence shows it has diverted into and through its canals for more than five years, to wit, 1,350 cubic feet of water per second. The claim, as stated, is mani-

festly not sufficient to state a right of diversion. It must appear, further, that the complainant is either the owner of land for which the water is being appropriated for a beneficial use, or that the water is being diverted for the purpose of being carried by the complainant to consumers who own land for which the water is being appropriated for a beneficial use, and that the water is being so used. The complainant in this case is not the owner of any land for which the water is being appropriated. *The complainant's right to divert the water of the river is therefore based upon and is measured and limited by the beneficial use of certain consumers for which the water is being appropriated.* But, if the amount required by these consumers for a beneficial use is not 1,350 cubic feet of water per second, then complainant has no right to divert that quantity of water; or, if, for example, these consumers require only 100 cubic feet per second for beneficial use, then that would be the basis and measure and limit of complainant's right to divert water from the river, and not the capacity of complainant's headworks, canals, and ditches used in making such diversion. *The water right must, therefore, be the right of the consumer and attached to his land, and not the right of the complainant attached to its canal system.* It follows that, under the law of this state, it cannot be valued as a property right upon which the complainant is entitled to an income from the water rate to be paid by the consumer. I do not overlook the fact that the right of the carrier to divert water from a running stream has been recognized in this state in some instances as a water right vested in the carrier, and that valuations of such supposed rights have been admitted by the consumers; but the consumers have not admitted that right in this case, and as I do not find it established by law, and the evidence is not sufficient to make it a law growing out of custom, I conclude

that it is not a right that complainant is entitled to have valued as its property right in this case." (Italics ours.)

These reasons given by the learned judge for his decision are, we claim, essentially sound. They are based upon the law and decisions of the State of California, and sustain his ruling that a water right, or right to use water, once dedicated to public use in California, thereafter belongs to the public consumer and not to the water company, which is but the carrier, agent and instrumentality for the distribution of the water to the public.

Again, suppose that the state, or some authorized agency, should condemn this water right for some greater public use, is it not too manifest for argument that the owners of the lands within the district irrigated from these canals would be, and that complainant would not be, entitled to compensation measured by the value of the water right. For the water right, or right to use the water, having become appurtenant to and attached to the lands, the owners of such lands would be the persons damaged by a deprivation of such use. It is true that, in such case, complainant would lose its diverting dam, its distributing works and its water distributing business, for all of which it would be entitled to compensation, but it would not be entitled to be compensated for any alleged loss of *any right to use the water*, which is the so-called water right, for it never had the right to use it, since the exclusive right to use it was in the owners of the lands within the irrigated district. This being so, it necessarily follows

that the owners of the irrigated lands, and not complainant, must be the owners of the water right.

It consequently follows from all of the foregoing, and as decided by the Circuit Court, that such water right, or use of such water, cannot be valued as the property of the water company in a proceeding to fix the rate for the distribution of such water to the public, which alone owns the right to its use. If this be so, as the Circuit Court has decided, irrespective of the cost to the water company in acquiring the right to take such waters for distribution, it must also and with greater force be true that a water right cannot be valued where, as in the case at bar, the water company has taken *without cost* to it the public waters of the state and dedicated them to the use of the public.

### Franchise.

- (e) **COMPLAINANT IS NOT ENTITLED TO HAVE ITS ALLEGED WATER RIGHTS VALUED AS ITS FRANCHISE. COMPLAINANT INTRODUCED NO PROOF AS TO FRANCHISES OR THEIR VALUE. COMPLAINANT'S FRANCHISES COST IT NOTHING.**

Complainant's claim in this regard is made in its brief, pages 72 to 79, but it is obvious that, if complainant is not, for the reasons hereinbefore urged, entitled to have its alleged water rights valued as part of its plant, it could not be entitled to have them valued by simply calling them its franchise, or by considering them a part of its franchise, and the Master and the Court so found and held (Rec. p. 106).

Furthermore, the record shows that plaintiff offered no evidence on the trial as to any franchise or as to

the value of any franchise, and the Master so found (Rec. p. 107), and the Court sustained such finding.

But, aside from the foregoing considerations, we contend that franchises of a public service water company that have cost it nothing should not be valued in a proceeding to fix the rates it should charge the consumer. In this suit complainant is a corporation organized under the laws of the State of Nevada, and its franchises from the State of California are the rights accorded it to do business and hold property in California and to charge and collect water rates. Aside from the small amount of money paid by complainant as fees to the Secretary of State of California upon filing in his office a certified copy of its articles of incorporation, complainant's franchises have cost it nothing and represent no investment by it. Now, as the value of the franchises depends entirely upon the profits earned by complainant, and as the profits depend upon the rates to be paid by the consumer, it becomes evident that, if a high rate could be justified on account of the great value of the franchise, then such high rate would in turn increase the value of the franchise itself and justify a still higher charge, and there would in time be no limit to raising the rates. It thus appears, we think, most conclusively, that the complainant's franchises should not be valued in the matter of fixing its rates. In

*Willcox v. Consolidated Gas Co.*, 212 U. S. 19, this question was considered. It there appeared that several gas companies had consolidated under the laws of the State of New York into the Consolidated Gas

Company; that, in effecting such consolidation, the franchises had been valued at \$7,781,000.00, and that shares of stock of the Consolidated Company had been issued upon such valuation and sold to the public. The trial Court in that case had, in addition to allowing said franchise valuation of \$7,781,000.00 as of the year 1884, the date of consolidation, also allowed the further franchise valuation of \$12,000,000.00 on the theory that the increased business since the consolidation had proportionately increased the value of the franchise considered subsequent to that date. This Court, in the opinion by Mr. Justice Peckham, held (p. 47) that the valuation of the franchises at the time of consolidation in 1884 should be accepted on the ground that

“The valuation was provided for in the Act, which was followed by the companies, and the agreement regarding it has been always recognized as valid, and the stock has been largely dealt in for more than twenty years past on the basis of the validity of the valuation and of the stock issued by the company.”

The Court, however, refused to allow the additional valuation of the franchises claimed to have accrued since the consolidation, for the reason that, prior to the consolidation, the gas rates had not been regulated by the legislature (p. 47):

“but that immunity for the future was, of course, uncertain; and the moment it ceased, and the legislature reduced the earnings to a reasonable sum, the great value of the franchise would be at once and unfavorably affected, but how much so it is not possible for us to now see. The value would most certainly not increase.”

This Court in that case did not intend that its acceptance of the valuation of the franchises had in 1884 should be considered as authority authorizing the valuation of franchises in rate cases generally, because it was solicitous to say further (p. 48):

“What has been said herein regarding the value of the franchises in this case has been necessarily founded upon *its own peculiar facts and the decision thereon can form no precedent in regard to the valuation of franchises generally where the facts are not similar to those in the case before us.*” (Italics ours.)

Now, in the case at bar there are no “peculiar facts” to justify the valuation of complainant’s franchises, and, moreover, there was, as before stated, no evidence introduced on the trial by complainant on the subject of its franchises, or to prove their value. If we correctly understand the decision of this Court in the gas rate case above referred to as to the franchise value claimed to have accrued subsequent to the consolidation, it is that a franchise of a public service corporation such as a gas company, or water company, can have no appreciable value in the proceeding to fix the rate, because the rate is uncertain in that it is subject to legislative regulation. If so, the case at bar is clearly within the ruling of this Court. We submit that the decision of the Circuit Court as to this matter was fully justified.

- (f) **COMPLAINANT IS NOT ENTITLED TO HAVE ITS ALLEGED WATER RIGHTS VALUED AS INCREASING THE VALUE OF ITS TANGIBLE PROPERTY, OR AS BEING TANGIBLE PROPERTY.**

Counsel make this claim on page 79 of their brief, but we do not think it necessary to discuss it at length,

because if, as argued in the foregoing points, complainant is not entitled to have their alleged water rights valued then, it obviously follows that it cannot become entitled by the device of considering them as adding to the value of its tangible properties, or as being tangible property.

**(g) A WATER RIGHT AS PROPERTY.**

Counsel for appellant at pages 69, 70 and 71 of their brief, cite a number of cases as authority for the proposition that a water right however acquired is property. We do not deny that a water right is property in the sense that it may be the subject of purchase and sale, but our contention, as hereinbefore made, is that a water right once devoted to public use is forever dedicated to such use to such an extent that the public users of the water are in legal effect the owners of the water right.

**Going Concern.**

**(h) COMPLAINANT IS NOT ENTITLED TO HAVE ANY VALUE OF ITS ALLEGED WATER RIGHTS ADDED TO THE VALUE OF ITS PLANT AS A "GOING CONCERN".**

Counsel contend for the contrary of this proposition at pages 82, 83 and 84 of their brief. In the first place, if we are right in our contention that complainant is not entitled to include the valuation of its alleged water rights as water rights, it must be clear that it cannot become so entitled simply by calling these alleged water rights a "going concern", or something to be considered a part of its properties as a "going concern".



In the next place, complainant is not entitled to any valuation of *any part* of its properties or of its business as a "going concern", because nowhere in this record did complainant offer or introduce any evidence of any value as to a "going concern".

**FINALLY, AS TO THIS POINT, COMPLAINANT HAS A MONOPOLY OF FURNISHING WATER IN THE TERRITORY UNDER THE FLOW OF ITS CANALS, AND HENCE IS NOT ENTITLED TO ANY VALUATION OF "GOING CONCERN" OR "GOOD WILL".**

This monopoly appears from the uncontradicted testimony of defendant's witnesses Wangenheim (Rec. pp. 726 to 731), and Henderson (Rec. pp. 760, 818), and the rule is well settled that, where a public service corporation has a monopoly, it will, in the matter of fixing its rates, not be allowed any valuation on account of "going concern" or "good will".

*Wilcox v. Con. Gas. Co.*, 212 U. S. 19;

*Contra Costa W. Co. v. Oakland*, 159 Cal. 323.

#### **REVIEW OF DECISIONS IN CASE AT BAR.**

What counsel say under this heading on pages 84 to 93 of their brief has been hereinbefore replied to by us in what we have said in support of the decision of the Circuit Court.

**(1) IN THE WATER RATE CASES REFERRED TO BY COUNSEL AT PAGE 93 OF THEIR BRIEF, NO QUESTION WAS RAISED OR DECIDED AS TO THE RIGHT OF THE WATER COMPANIES TO HAVE THEIR WATER RIGHTS VALUED.**

On page 93 of their brief counsel refer to several water rate cases decided by the Circuit Court of the Eighth Judicial Circuit, and in which cases they say

that the Court decided that the water companies were entitled to a return upon their water rights.

In the first place, an examination of the record and decisions in those cases will show that there was no attempt made to value the water rights separately, apart from the real estate constituting the riparian lands and water sheds owned by the companies, and next, that no contest was raised or decided in those cases as to whether or not any water rights should be valued. These cases were referred to by the Judge of the Circuit Court in his opinion in the case at bar, when he said:

"I do not overlook the fact that the right of the carrier to divert water from a running stream has been recognized in this state in some instances as a water right vested in the carrier, and that valuations of such supposed rights have been admitted by the consumers, but the consumers have not admitted that right in this case, and as I do not find it established by law, and the evidence is not sufficient to make it a law growing out of custom, I conclude that it is not a right that complainant is entitled to have valued as its property right in this case." (Rec. pp. 224, 225.)

- (J) **THE IRRIGATION ACT OF 1885 DOES NOT CONTEMPLATE OR PROVIDE THAT WATER RIGHTS ARE TO BE CONSIDERED AS PART OF THE CAPITAL OF THE COMPANY ON WHICH IT IS ENTITLED TO A RETURN, AND, IF THE ACT DID SO PROVIDE, IT WOULD BE IN VIOLATION OF ARTICLE XIV OF THE STATE CONSTITUTION DECLARING SUCH WATERS A PUBLIC USE.**

Counsel at page 63 of their brief claim that the California Irrigation Act of 1885 (Appendix) *contemplates* that water rights are to be considered as part

of the capital of a public service water company on which it is entitled to a return. In other words, that said Act contemplates that the county board of supervisors shall in fixing the rate include in its valuation of the plant the value of the company's alleged water rights.

In the first place, the said Irrigation Act does not so provide, and we claim that the failure of the Act to so provide is significant authority in support of defendant's contention that such valuations should not be included. Section 1 of the Act follows the language of Article XIV of the State Constitution in providing that

*"The use of all water now appropriated, or that may hereafter be appropriated, for irrigation, sale, rental or distribution, is a public use, and the right to collect rates, or compensation for the use of such water is a franchise."* (Italics ours.)

Section 4 provides that

*"At the hearing of said petition the board of supervisors shall estimate, as near as may be, the value of the canals, ditches, flumes, water-chutes and all other property actually used and useful to the appropriation and furnishing of such water, belonging to and possessed by each person, association, company, or corporation whose franchise shall be so regulated and controlled."* (Italics ours.)

It will be noted that the rate board is not given authority to value any "water" or "water right" or "right to use water", and, since both the constitution and the Act in question both specifically declare that the use of all water appropriated, that is dedicated to

sale, rental and distribution is a *public* use, it would seem clear that the water itself and the right to use it could not and was not to be valued in the valuation of the "properties used and useful to the appropriation and furnishing of such water," and that such properties can be nothing more, or other, than the dams, canals and other things constituting the diverting and distributing system necessary to a use by the public of the waters and water rights that have been appropriated, that is, dedicated by the water company to the public.

In Section 5 of the Act occurs the language quoted and relied upon by complainant as: "contemplating", it is claimed, that the rate board is to include a valuation of the water rights. This language is that

"But in estimating such net receipts and profits, *the cost of any extensions, enlargements or other permanent improvement of such water rights or water works* shall not be included as part of said expenses of management, repairs, and operating of such works, but when accomplished, may and shall be included in the present cost and cash value of such work." (Italics ours.)

The above provision in this section that the cost of any permanent improvement of the water rights should be added to the present cost and value of the plant was clearly intended to mean the cost of any new works of a permanent character that should improve the water right, that is, improve the use of the waters or the instrumentalities for their better or improved use by the public consumers or irrigators, and the provision does not, either expressly or by any proper

implication or construction, authorize the valuation of any water right itself.

Furthermore, if the provision does by any construction authorize the valuation of any water right, it is in violation of Section XIV of the State Constitution declaring the use of such water to be a public use.

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## II.

### Value of Earthwork.

**THE COURT AND MASTER DID NOT ERR IN ALLOWING EIGHT CENTS A CUBIC YARD AS THE COST OF THE EARTHWORK IN 1907.**

**IT WAS NOT ADMITTED THAT IT WOULD COST ALMOST THAT AMOUNT IN 1896, AND THE COST OF LABOR AND MATERIAL WAS NOT IN 1896 ONE-HALF LOWER THAN IN 1907.**

**THE COURT AND MASTER DID NOT DISREGARD THE REPRODUCTION COST IN 1907, NOR DID THEY SUBSTITUTE THEREFOR THE AVERAGE COST OF REPRODUCTION DURING A SERIES OF YEARS.**

Counsel for appellant on pages 111 to 117 of their brief assert the contrary of the above propositions in their attack upon the Master's finding, confirmed by the Court, that the value of the earthwork, that is, of excavating complainant's canals, should be estimated upon the basis of eight cents per cubic yard as the reasonable cost of reproducing the same in 1907. The Master in his report quotes very fully from the testimony of the expert witnesses and found that "a fair allowance, under all the testimony, would be an average estimate of eight cents a cubic yard" (Rec. pp. 64 to 73). The Judge of the Circuit Court also went

into this matter and sustained the Master's finding (Rec. pp. 205, 206).

As stated by both the Master and the Court, the question of the cost of this earthwork amounting to 5,367,768 cubic yards, depended largely upon the methods employed.

According to the report of Goodwin, complainant's expert, made in December, 1906 (Exhibit 1, Rec. p. 930), the cost of reproducing the earthwork, including cost of engineering and superintendence, was estimated at an average of 10.725 cents per cubic yard (Rec. pp. 68, 930), *but without any allowance for depreciation* (Rec. p. 289). In 1896, when complainant's rates were being fixed by the board of supervisors of Stanislaus County, this same engineer Goodwin, on behalf of the county and irrigators, made an examination and report as to the parts of the then canals useful to that county, and such report of 1896 is in evidence in the case at bar (Exhibit A, Rec. pp. 304, 1216 to 1267). In such report for 1896, Goodwin estimated the cost of the earthwork at 6½ cents per cubic yard (Rec. pp. 301, 302), including cost of engineering and superintendence (Rec. p. 304), and counsel is mistaken in saying (Brief p. 111) that said 1896 report of Goodwin did not include engineering and superintendence (Rec. p. 304). Furthermore, according to Goodwin's 1896 report, the depreciation is shown to be about twenty per cent of the then reproduction cost (Rec. pp. 304, 305).

Goodwin testified that his estimate in Exhibit I of the cost of the earthwork in 1907 was based upon doing the work by scrapers (Rec. p. 316).

Complainant also introduced the testimony of Warren, a contractor, who testified that the earthwork would cost 25 cents a cubic yard, but if done by dredgers, about 13 or 14 cents (Rec. p. 640). The estimates of Warren were made from a contractor's standpoint only, for he stated upon cross-examination that they were based upon what a contractor would charge (Rec. p. 642), so that his estimate, thus including the contractor's profit, has no value.

Complainant's engineer Hammatt testified that he had in 1907 and 1908 done excavating for complainant at a cost of from 10 to 15 cents per cubic yard (Rec. p. 554). But Hammatt did not use the cheaper combination excavator and dredger method. Furthermore, he did not himself keep any accounts of the cost of his work, but obtained the figures from others, so that his testimony as to cost is hearsay only (Rec. pp. 925, 926).

On behalf of defendants were introduced in evidence the report and testimony of engineer Henderson (Exhibit R, Rec. pp. 1355, 750, 881), the report and testimony of engineers Sloan and Smith (Exhibit 3, N. E. L., Rec. pp. 1339, 696); the testimony of engineers Southard and Dasher (Rec. pp. 882, 920, 870), and the report and testimony of said Goodwin and other engineers before the supervisors in 1896 (Exhibit N, Rec. pp. 1287 to 1339). The defendants' engineers estimated that the earthwork could be reproduced in 1907 at a cost, including engineering and superintendence, of from 4 to 6 cents a cubic yard if the work was done by using modern excavators and dredgers,

by which large quantities of earth could be excavated far more rapidly and cheaply than by using, as estimated by complainant's engineer Goodwin, the antiquated, obsolete and expensive method of plows and scrapers.

Defendant's civil and hydraulic engineer, Henderson, testified that, with the modern excavating "New Era" grader he had constructed a canal at the actual cost of a little over 4 cents per cubic yard (Rec. pp. 792 to 795); that drainage canals were being constructed near Stockton, California, by the combined excavator and dredger method (Rec. pp. 795, 796); that complainant's canals could be reproduced by the same methods, viz.: by first excavating and building the banks on each side of a core of earth with a modern excavator or grader, and then removing the core with a dredger, and that such work could be done by complainant at an actual cost not exceeding 5 cents per cubic yard (Rec. pp. 793, 796, 798, 68). Henderson did not, as claimed by counsel (Brief p. 113), abandon his method of constructing the canal. Nor is there any testimony or evidence, as intimated by counsel, that the soil through which these canals run are adobe or sand, or of any character not susceptible of being easily excavated and built into a canal by the excavator-dredger process. On the contrary, the testimony of Henderson is that there is nothing in the character of the soil to render it in any sense difficult to dig the canal by machinery, although that in some places it would be necessary to use a scraper (Rec. p. 755).



Defendants' witness Dasher, a mechanical engineer and agent for the New Era and Western Giant graders, testified that such machines are in constant use for digging canals, and that their graders, or elevators could be extended so as to dig large canals (Rec. pp. 870, 871).

Defendants' witness Southard, a civil engineer, testified to building part of a canal in Colusa County, California, with the New Era grader, at a cost of from 3 to 5 cents per cubic yard; that the work had cost him  $7\frac{1}{2}$  cents per cubic yard when the grader with an elevator only twenty-two feet long had to be supplemented by horse scrapers (Rec. pp. 883, 920). The witness failed to finish this contract solely because of a difference with the owner about signing a formal contract, and not, as intimated by counsel (Brief p. 114), because he was losing money (Rec. pp. 887, 888). He also testified that canal banks built with excavators or graders should be tamped down by horse scrapers, that he had pursued that method on the Colusa work, and that the entire work after having charged against it everything, including expense of horse scrapers, cost from 3 to 5 cents per cubic yard (Rec. pp. 893, 894). He afterwards testified that said cost did not include certain scraper work made necessary because of the short arm of the excavator he was using, and that, including such additional expense, the cost of the work was about  $7\frac{1}{2}$  cents per cubic yard (Rec. p. 920).

A very strong and pertinent bit of evidence, proving in the most convincing manner that Goodwin's estimate

of the cost of the earthwork was entirely too high, is furnished by the fact that at his rate of over 10 cents per cubic yard he estimated the cost in 1907 of the outside canal and outside canal extension to Los Banos Creek at \$168,850.42 (Item \$82,134.10, Rec. p. 933; Item \$86,716.32, Rec. p. 977), while Merritt, complainant's secretary and witness, swore that the same work actually cost but \$86,315.56 (Rec. p. 359), Goodwin's estimate being nearly 100 per cent more than the actual cost. Counsel and their witness Goodwin, when confronted with the latter's report and testimony taken in 1896 that he had then estimated the cost of the earthwork, including engineering and superintendence, at 6½ cents per cubic yard, could only give in explanation the answer that labor was cheaper then than in 1907, but, even admitting that such was the case, we must bear in mind *that Goodwin's estimates for all dates is based upon doing the entire work by the expensive method of plows and scrapers*, which necessarily would require the employment of a far greater number of men and horses than would be required should the work, or at least the greater part of it, be done, as it obviously can be, by the up-to-date and less expensive method of excavators and dredgers, or even by excavators and scrapers.

It was not generally admitted, as stated by counsel (Brief p. 4), that the cost of reconstruction in 1907 was approximately double the cost in 1907. We also deny the statement by counsel (Brief p. 6) that defendants admitted that the cost of the earthwork in 1896 would be substantially 7½ cents per cubic yard,

exclusive of 10 per cent for engineering and superintendence. As before shown, defendants contended that the cost in 1896, even when the work was done by the expensive method of plows and scrapers, would not exceed 6½ cents per cubic yard, and this in accordance with Goodwin's 1896 report in which was included, as before shown, ten per cent for engineering and superintendence.

After considering the most minute details of all the testimony and evidence bearing upon this, the Master found and concluded that "the work would now be done with a combination of excavators and scrapers; the excavators to the extent that they could be used would lessen the cost of construction. \* \* \* It seems to me a fair allowance, under all the testimony, would be an average estimate of eight cents a cubic yard." This finding of the Master has been approved by the Circuit Court, and we submit it is fully sustained by the evidence.

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### III.

#### Appreciation of Earthwork.

THE COURT AND MASTER DID NOT ERR IN FINDING THAT COMPLAINANT WAS NOT ENTITLED TO HAVE ADDED TO THE VALUATION OF ITS PLANT THE ALLEGED APPRECIATION OF THE EARTHWORK. SUCH FINDING WAS NOT BASED, AS CLAIMED BY COMPLAINANT, UPON THE FACT THAT ITS WITNESS WAS NOT SUFFICIENTLY QUALIFIED TO ESTABLISH APPRECIATION, BUT WAS BASED UPON THE FAILURE OF COMPLAINANT TO PRESENT ANY SATISFACTORY PROOF OF APPRECIATION, AND ALSO UPON THE FACT FOUND THAT THE APPRECIATION, IF ANY, WAS OFFSET BY THE DEPRECIATION.

Complainant claimed that the earthwork of its canal had appreciated in value over its value considered as

earthwork of a newly constructed canal, because the loss of water by seepage would be less in an old canal than in one newly constructed. To prove this, complainant's engineer Hammatt testified that, according to his calculations, the water so saved in complainant's canal would, if complainant had sold it at the regular rates, represent an added value to the earthwork of \$125,250.00 (Rec. pp. 543, 550). These calculations made by Hammatt depended entirely for their basis and accuracy upon his knowing and testifying to the satisfaction of the Master and Court as to *the loss of water by seepage from new canals*, in comparison with the loss from old canals; and it is furthermore evident that such comparative seepage loss could only be established by carefully conducted water measurements *both on new and old canals*. The witness Hammatt entirely failed to supply any such proofs in support of his estimate of appreciation. He testified that he had only entered complainant's employ in 1907 (Rec. p. 558); that he had given attention to the amount of loss of water from seepage and evaporation only in a general way; had been unable to get accurate figures on them; that he had experimented himself, *but had been unable to get figures on new canals*; that the best he was able to do was to assume the loss at a quantity (Rec. pp. 543, 544); that, before his employment by complainant in 1907, he had never had occasion to estimate the loss of water by seepage or evaporation in an irrigation canal under the conditions exhibiting the same or similar soil and climate as that obtaining in complainant's canal, and had never before had ex-

perience in making water measurements (Rec. p. 581); that in August, 1907, he had measurements taken over the complainant's system for three weeks, but those for the first two weeks had to be thrown out because of the inexperience of the man taking them; that he got one week's measurements in August, 1907, and measurements for July and August, 1908, as to loss from *seepage and evaporation* (Rec. p. 544); that his measurements of waters running through the waste gates at the time he was estimating loss of waters by seepage from complainant's canal, were not taken on many days, and his alleged results are therefore absolutely unreliable (Rec. pp. 573 to 581).

In order to arrive at the seepage loss, it was of course, necessary for Hammatt to have also taken into account the loss by evaporation, and, as to that, he admitted that he knew nothing of his own knowledge, but assumed such loss at ten to twelve per cent. upon what some one told him (Rec. p. 559).

Now, as the witness admitted that he knew nothing about the loss of water by seepage from new canals, and as his appreciation calculations were based entirely upon the comparative greater loss in a new canal than in an old one, it must be evident that his actual measurements of losses in complainant's old canal only, and without any measurements or definite knowledge on his part as to losses in new canals, could not furnish any satisfactory basis for such calculations, and consequently the Master and the Court found that complainant, upon whom rested the burden of proof, had failed to furnish

any satisfactory proof of such alleged appreciation (Rec. pp. 92, 209, 210).

But, in addition to so finding, both the Master and Court also found that complainant was not entitled to any such appreciation, because the same, if any, was fully offset by the depreciation of the earthwork from the collection of berm and silt in the canal (Rec. pp. 92, 93, 210). That the earthwork had depreciated from silting appears in the most conclusive manner from complainant's maintenance accounts, from which it appears that complainant, from and including 1900 to and including 1908, expended large amounts of money for cleaning out the canal (Rec. pp. 1344 to 1347, 1109). Under the testimony, the Master and the Court were fully justified in finding that nothing should be added to the valuation of the earthwork on account of its alleged appreciation.

**Furthermore, the alleged appreciation of the earthwork should not be considered, because in the proceedings, inaugurated by complainant, before the boards of supervisors to fix the rates for 1907, complainant made no claim that any appreciation value should be added to the cost of reproducing the earthwork. It made such claim for the first time in the Circuit Court, and, for the reasons before stated in this brief, complainant cannot now assert any such claim.**

### Valuation of Structures.

**THE MASTER AND COURT DID NOT ERR IN FINDING THAT THE VALUE OF REPRODUCING THE STRUCTURES OF THE CANALS WAS TWENTY-FIVE PER CENT LESS THAN THE VALUATIONS GIVEN BY COMPLAINANT'S WITNESS GOODWIN.**

This matter is discussed by counsel at pages 132 to 141 of their brief. Complainant's witness Goodwin, in his estimates of values (Exhibit 1, Rec. p. 930), gave the value of the structures including ten per cent for engineering and superintendence, *but without any deduction* for depreciation, at the sum of \$315,515.14. The Master went over the matter very carefully, and found that Goodwin's estimates were twenty-five per cent too high (Rec. pp. 75 to 78). By way of illustration, the Master showed that Goodwin had estimated the cost of reproducing the headworks in 1907 at \$54,046.50, while in 1896 he had estimated the then cost of the same structures at \$28,988.28, Goodwin's estimate in 1907 being ninety-three per cent higher than in 1896.

To Goodwin's estimate of 1896, the Master added ten per cent for engineering and superintendence, and thirty-three and one-third per cent for increased cost of production between 1896 and 1907, thus bringing the cost in 1907 up to \$41,540.87, which was thirty per cent less than Goodwin's estimate of \$54,046.50 for 1907 (Rec. p. 76).

The structures on the canal were of wood, so that the chief cost entering into their construction was carpenter labor and lumber. Goodwin testified that

the wages of carpenters on bridge work were no higher in 1907 than 1896 (Rec. p. 317), and the Master found that, while the cost of materials and labor were higher in 1907 than in 1896, yet that such higher prices were abnormal and due to the San Francisco earthquake and fire in April, 1906, and that it would be unjust to the consumer to take such abnormally high cost as a basis of valuation.

The result of the Master's estimate as shown by his illustration of the cost of the headworks, is that, after adding to Goodwin's estimates in 1896, ten per cent for engineering and superintendence, and thirty-three and one-third per cent for increased cost of production, his, Goodwin's, estimates for 1907 were still thirty per cent higher than his estimates for 1896, so the Master was fully justified in finding that the structures were of a value that was twenty-five per cent less than Goodwin's estimate for 1907, viz., of the value of \$315,515.14, from which the Master properly deducted thirty per cent or \$94,654.54 for depreciation, Hammatt, complainant's engineer, in his estimate (Exhibit 26, Rec. p. 1141) having given the depreciation of the structures at \$115,266.09, which was more than thirty per cent of the valuation of the structures given by Goodwin for 1907.

Counsel are mistaken in saying at pages 132 and 133 of their brief that the Master erred as to his figures in regard to the comparative cost of the outside canal in 1898 and 1907. In the first place, the Master's



report will show that, in considering the cost of the structures, he made no reference to the outside canal, or its cost (Rec. pp. 75 to 78). The Master did, however, refer to the outside canal when he was considering the cost of reproducing the earthwork in 1907 (Rec. p. 71). The comparative cost of the outside canal is, however, just as pertinent to the structures as it was to the earthwork, but counsel are mistaken in saying (Brief p. 133) that the Master made any error in regard to the cost of the outside canal in 1898. The cost of the outside canal in 1898 that the Master referred to was the cost of so much of it *as extended to Los Banos Creek*, and not the cost of the added section to Quinto Creek, and this was because Merrill, complainant's secretary, had testified that the cost of the outside canal to Los Banos Creek was \$86,315.56 (Rec. p. 359), while Goodwin's estimate for 1907, for the outside canal to Los Banos Creek, was \$168,850.42 (Rec. p. 933, item \$82,134.10; Rec. p. 977, item \$86,716.32). But complainant's case is equally bad if we should take the outside canal down to Quinto Creek. For, according to Merritt, the actual cost of constructing it in 1898 was \$149,960.77, while according to Goodwin, the actual cost in 1907 would be \$243,678.99 (Rec. p. 933, item \$82,134.10; Rec. p. 977, item \$86,716.32, item \$74,828.57). So that the outside canal to Los Banos Creek, together with its extension to Quinto Creek, would, according to Goodwin, cost 60 per cent more than it actually did in 1896. Such being the grossly high reproduction cost estimates of Goodwin for 1907, the Master and the Court were,

under the evidence, fully justified in deducting twenty-five per cent from them.

In addition to this, Henderson, the expert engineer for defendants, estimated the cost of the structures of the canals, including engineering and superintendence and deducting thirty per cent for depreciation, at \$185,900.38 (Exhibit R, Rec. p. 1355). It is not true, as claimed by counsel, that Henderson did not examine nor report as to the greater part of the canals. By reason of stormy weather, he was unable to include in his examination and report a few parts only of the system, viz., the small Dos Palos Branch canals 1, 2, 3 and 4 in Merced County, and the small Oristimba Branch Canal, the total cost of reproducing which in 1907, according to Goodwin's excessively high estimates, would not exceed \$40,159.37, including ten per cent for engineering and superintendence.

We submit that, upon all the evidence as to this matter, the Master and the Circuit Court were fully justified in finding as they did as to the value of the structures of the canals in 1907.

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### Fences.

**THE MASTER AND COURT DID NOT ERR IN REFUSING TO INCLUDE IN THE VALUATION OF COMPLAINANT'S RIGHTS OF WAY THE COST OF FENCING THE SAME.**

Counsel present this matter at page 141 of their brief.

It is admitted by counsel (Brief p. 141) that the fences were not constructed by complainant, and the testimony

of Pfitzer, a witness for defendants, is that the fences along the canals were built by the farmers owning the lands through which the canals run (Rec. pp. 669, 688). The Master found that the cost of reproducing complainant's canals should be confined to the cost of reproducing what the complainant actually owned, and not to what it did not own, and further that it does not appear that the complainant maintains or pays any portion of the maintenance of the fences that the farmers built, or that complainant has any interest in them (Rec. pp. 86, 87). We think that the reasons given by the Master for his finding are sound and a complete answer to counsels' theory that, if the rights of way should be condemned, the cost of fencing would be included. It seems clear to us that the evidence must necessarily be confined to the cost of reproducing the properties *as they actually exist* at the time the rates are fixed. This is what the word "reproduction" means and can only mean in this connection.

Furthermore, for the reasons hereinbefore stated by us, complainant is not entitled to have the alleged value of fences included, because it did not refer to fences nor their value when the value of its plant was being considered by the boards of supervisors in the matter of fixing the water rates complained of, and no such claim was made until this suit was brought.

## VI.

**Complainant's Receipts From Water.**

THE MASTER AND COURT WERE FULLY JUSTIFIED UNDER THE EVIDENCE IN FINDING THAT COMPLAINANT SHOULD BE CHARGED WITH HAVING RECEIVED FROM MILLER & LUX \$14,513.53 FOR IRRIGATING CERTAIN OF THEIR NON-RIPIARIAN CULTIVATED LANDS, AND FOR WHICH COMPLAINANT HAD ONLY CHARGED MILLER & LUX A WATER CARRIAGE OF \$1163.97 UNDER THE DISCRIMINATING CONTRACT, EXHIBIT E, AND, AS TO THIS, THE MASTER FINDS THAT COMPLAINANT, FOR THE PURPOSE OF DISCRIMINATING FOR BENEFIT OF MILLER & LUX, UNLAWFULLY PERVERTED THE CONTRACT, EXHIBIT E, AND HAS NOT COME INTO THIS COURT OF EQUITY WITH CLEAN HANDS.

This matter is referred to at page 9 of counsel's brief.

On the trial before the Master, complainant claimed that Miller & Lux should not be required to pay it the regular county rates amounting to \$14,513.53 for the irrigation of 14,111.65 acres of their non-riparian cultivated lands, but only a carriage charge of \$1163.97. Complainant made this claim on the pretense that there was not for the year 1907-8 sufficient of the 760 cu. ft. of water, allowed it by the decision in the Stevenson case for non-riparian lands, to irrigate said 14,111.65 acres of Miller & Lux non-riparian lands, and that therefore it had been compelled to irrigate such lands with the waters belonging to Miller & Lux and for which a carriage charge could only be made by it against Miller & Lux. The Master made a most exhaustive examination of this matter, as will appear from this report (Rec. pp. 137 to 150), and shows most conclusively from the evidence that complainant's claim as to this matter was *absolutely unfounded and false*; that

the said 14,111.65 non-riparian acres of Miller & Lux could have been irrigated from the 760 cu. ft. of water belonging to complainant for irrigating non-riparian lands; that Mr. Henry Miller, being president of both complainant and Miller & Lux, *good faith was required in the dealings between the parties, and that complainant had not, in the matter, acted in good faith and had not come into a court of equity with clean hands.* The Master gives his conclusions as to this matter in the following language:

“Referring to the contract (Exhibit E, Rec. p. 1260), which, as shown, provides only for the carriage of water for riparian land, it is clear that such contract was made solely because of the belief that the decision in the Stevenson case aforesaid limited the canal company to a total intake of 760 feet, and that with such intake the canal company would not be able to irrigate, in addition to the non-riparian lands of its customers, all the riparian lands of Miller & Lux and of the Las Animas & San Joaquin Land Company which had theretofore been irrigated by the canal company. It developed afterwards that the canal company’s rights to take water for such riparian lands was not determined in that case, and the necessity for the company to carry water for the said companies to irrigate said riparian lands did not arise, and none was carried. In like manner, if the canal company has sufficient water to irrigate said 14,111 acres of non-riparian land, the necessity for it to carry water for Miller & Lux in order to enable them to continue to irrigate the same does not arise.

“It appears that Mr. Henry Miller is president of complainant, and that he and the interests he represents control both the canal company and the corporation of Miller & Lux. *Under those circumstances the dealings of the canal company with Miller & Lux must be in the utmost good faith,*

*and it must come into a court of equity with clean hands. It is not contemplated by the contract (Exhibit E) that the water should be carried at a carriage charge for lands that the company had theretofore irrigated and which it was still able to irrigate. It is a perversion of the objects of this contract (which, had the situation been as supposed, was a beneficial arrangement for the canal company) to apply the same to the carriage for water to lands which the canal company is able to irrigate, and thus deprive it of a revenue of over \$12,000.00."* (Rec. pp. 148, 149.) (Italics ours.)

As to this matter, counsel apparently confess error. They claimed in their brief (p. 58) in the Circuit Court that complainant's attempt to charge Miller & Lux with a carrying charge only for this water was the result of *a mistake*. This *little mistake*, after deducting from the \$14,513.53 (that should have been charged Miller & Lux) the \$1,163.97 carriage charge, amounted to \$13,349.56. Counsel have not pointed out anything in the evidence showing this to have been a mistake. On the contrary, the evidence and all the circumstances in the record show **that it was a deliberate attempt by complainant to illegally benefit its controlling stockholder, Miller & Lux, to the detriment of all the other irrigators to the extent of \$13,349.56, and to have it appear on the trial of this case that the receipts under the water rates complained of were unreasonably low and insufficient.**

That this was not the result of any mistake most conclusively appears from the fact that *after* the entire illegal scheme had been exposed by defendants on hearing before the Master (Defendants' Brief before Master, pp. 49 to 56), nevertheless complainant in its reply brief before the Master entitled "Memorandum in Re-

ply to Defendants' Brief", at pages 20 and 21, persisted in insisting on the "carriage charge" only under Exhibit E.

**THE MASTER HAVING FOUND THAT COMPLAINANT HAS NOT COME INTO COURT WITH CLEAN HANDS, AND HIS FINDINGS BEING FULLY SUPPORTED BY THE EVIDENCE, DEFENDANTS ARE ENTITLED TO A DISMISSAL OF THE BILL OF COMPLAINT ON THAT GROUND, ASIDE FROM THE GROUND THAT COMPLAINANT HAS WHOLLY FAILED TO ESTABLISH ITS CASE THAT THE RATES ARE UNREASONABLY LOW.**

*Clark v. White*, 12 Peters 178;

*Galloway v. Finley*, *id.* 297;

*Wheeler v. Sage*, 1 Wall. 518;

*Kitchen v. Rayburn*, 19 Wall. 518;

*Manhattan etc. v. Wood*, 108 U. S. 218;

*Roberts v. Northern Pac. R.*, 158 U. S. 13;

*New York v. Pine*, 185 U. S. 103;

*Creath v. Sims*, 5 How. 192.

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## VII.

### **Complainant to be Charged With Public Rates for Water Supplied Miller & Lux Under Discriminating Rate Contracts.**

**THE MASTER AND COURT DID NOT ERR IN CHARGING COMPLAINANT WITH THE FULL WATER RATES FOR WATER FURNISHED TO MILLER & LUX UNDER ITS SPECIAL DISCRIMINATING CONTRACTS WITH MILLER & LUX AGREEING TO FURNISH THEM WATER AT LESS THAN REGULAR RATES. SUCH SPECIAL DISCRIMINATING CONTRACTS WERE NOT MADE IN CONSIDERATION OF ANY WATER RIGHTS FROM MILLER & LUX TO COMPLAINANT OR ITS PREDECESSORS.**

Counsel argue this matter in their brief at page 8 and also at pages 142 to 147. They admit (Brief p.

142) that, if a water company makes a contract with a consumer to furnish water at less than the rate established by public authority, it should, in a proceeding attacking the rate as unreasonably low, be held by the Court to have actually received the public rate and not the lesser special contract rate, and such rule is firmly established by the authorities.

*Wilcox v. Con. Gas Co.*, 212 U. S. 19;

*Knoxville v. Knoxville W. Co.*, 212 U. S. 1;

*Boise City I. & L. Co. v. Clark*, 131 Fed. 415;

*San Diego v. National City*, 74 Fed. 79;

*Contra Costa W. Co. v. Oakland*, 159 Cal. 323.

But counsel say further that this rule does not apply in this case, because, they claim, that the discriminating water rate contracts of complainant and its predecessors were made with Miller & Lux in consideration of water rights which, they claim, Miller & Lux granted to complainant's predecessors, and that therefore complainant should not be charged as having received from Miller & Lux the full supervisors' water rates complained of in this suit.

We have hereinbefore in this brief fully considered and replied to complainant's claim that these discriminating rate contracts were made in consideration of water rights, and we refer to our argument there made in support of the finding of the Master and Circuit Court that said discriminating rate contracts *were not made in consideration of any water rights from Miller*. Under the authorities above cited, complainant was properly charged by the Master and Court as having received from Miller & Lux the full supervisors' rates attacked in this suit.



## VIII.

**Maintenance.****THE MASTER AND COURT DID NOT ERR IN ALLOWING THE  
AVERAGE MAINTENANCE FOR CANAL CLEANING AND FOR  
LEGAL EXPENSES.**

Counsel contend for the contrary of the above proposition at page 8 and pages 146 and 147 of their brief. The Master went thoroughly into this matter of maintenance (Rec. pp. 117 to 129). Complainant's annual maintenance accounts disclosed especially as to canal cleaning and litigation that the expenses were not uniform, but varied greatly in amount from year to year. The Master calls attention to the Irrigation Act of 1885 (Appendix), which does not provide that the water rates shall be established anew each year, but that, when established, they shall be in force for at least a year and until again fixed upon petition of the water company, or of the consumers. The Act also provides that, in fixing the rates, the board of supervisors "*shall estimate the annual reasonable expense*" of the water company. This can only mean, as the Master says, the "usual yearly expense, and not the expenses for the particular year in which the rates are fixed, except as the expense for such year enables them to ascertain such annual expense" (Rec. pp. 117, 118).

In regard to the expense of canal cleaning, it varied from 1900 to 1908, inclusive, from \$277.15 to \$13,747.14, and, accordingly, the Master and Court allowed the annual average of \$6,074.23 (Rec. p. 126), which we submit was a reasonable and proper allowance under the evidence.

As to expense of litigation, the same method of average was properly pursued by the Master and Court in allowing an annual average of \$11,721.31 for such expense, which for the eight years from 1901 to 1908, inclusive, ran from \$1609.25 to \$21,144.90 a year (Rec. p. 127). This allowance was especially generous when it appeared that in most of the suits the complainant was not even a party, but was charged with one-half of the expenses (Rec. pp. 493, 494, 495, 537, 1259, 1343 to 1350, 1109). Miller & Lux had charge of complainant's litigation (Rec. pp. 361, 497). It further appears that most of the litigation has been disposed of (Exhibit P, Rec. p. 1347), and that the disposition of the case of *Turner v. Eastside C. & I. Co.* will determine all controversies with Stevenson and the Eastside C. & I. Co. (Rec. p. 494). So that the annual allowance of \$11,721.31 by the Court and Master was most liberal under the evidence.

### Salaries.

**COMPLAINANT IS NOT ENTITLED TO HAVE \$4860.00 ON ACCOUNT OF SALARIES ADDED TO ITS ANNUAL MAINTENANCE ACCOUNT FOUND BY THE MASTER AND COURT.**

Upon pages 11 and 12 of their brief, counsel *for the first time at any stage of this suit* claim that this Court should add to complainant's annual maintenance account as found and fixed by the Master and Court at \$67,114.84 (Rec. p. 128), the further sum of \$4860.00, and which sum they claim should be added as an increase in the salaries of its officers. The only ground urged by counsel for such increase is that such officers were, prior to the year 1878, when Miller & Lux first

obtained control of complainant canal company, receiving salaries exceeding the salaries ever since paid its officers, in amounts aggregating \$4860.00.

Complainant is not entitled to have this Court so increase its salary account, for the following reasons:

*First:* Because in complainant's own statement of annual maintenance it claimed that it should be allowed for salaries the sum of \$6929.49 (Exhibit 16, Rec. pp. 1109-1110), and the Master and Court accepted and acquiesced in complainant's claim in that regard and allowed complainant for annual salaries the exact amount, viz., \$6929.49, claimed by it (Rec. pp. 128, 215).

*Second:* Because complainant accepted and acquiesced in the said finding of the Master, and did not except thereto, for the very obvious reason that the Master had allowed it on this account the full amount it had claimed (Rec. pp. 171-176).

*Third:* Because complainant has not in any of its assignments of error herein, assigned as error the failure of the Court to allow it any greater sum on this account than it had asked for on the trial.

*Fourth:* Because there is no evidence, or proof, that the amount allowed by the Master and Court on account of salaries is not a reasonable allowance. The evidence shows, as we have before seen, that the officers, viz., the president, vice-president, secretary and engineer of complainant corporation, are also respectively the president, vice-president, secretary and engineer of Miller & Lux; that Miller & Lux own eighty per cent of complainant's capital stock and have control of its

board of directors; that complainant's said officials are also paid salaries by Miller & Lux (Rec. pp. 360 to 364, 519), but there is no satisfactory proof in this record that the amount of \$6929.49, asked for by complainant on the trial of this case in the Circuit Court and allowed by the Court for salaries, is not a reasonable amount. The only testimony about the matter was that of complainant's secretary, Merritt, who said that he did not know how the time of their officials was divided between the two companies (Rec. pp. 361-362).

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## IX.

### **Rates in Stanislaus County.**

**THE RATES IN STANISLAUS COUNTY SHOULD BE LOWER THAN THOSE IN MERCED COUNTY, BECAUSE THE GREATER PART OF THE CANALS ARE IN THE LATTER COUNTY AND A LARGE PART OF THEM ARE NOT USEFUL TO STANISLAUS COUNTY.**

The Supervisors rate for Merced County for 1907 was \$1.65 per acre, while that for Stanislaus County was \$1.50 an acre. This discrepancy counsel claim at page 3 of their brief to be unjustifiable because, they say, that the loss of water by seepage and evaporation is 33 per cent to Merced County and 53 per cent to Stanislaus, and that it costs more to deliver water (considered as freight) to Stanislaus County than to Merced County.

In the first place, the loss of water from seepage and evaporation is not 53 per cent to Stanislaus County. The Master considered carefully this question under

the evidence, and found that the loss for the entire canals did not exceed 33.87 per cent (Rec. p. 148), and as the canal, which is about 75 miles in length, only runs for about 4 miles only in Stanislaus County, it is evident that the loss from seepage and evaporation down to the Stanislaus County line cannot exceed 33.87 to any appreciable extent.

A sufficient reply to counsel's contention is that the differences in the county rates is wholly immaterial in this suit, for the question is: are the rates sufficiently *as a whole* to give complainant a reasonable return? This is so, for when the question of the sufficiency of the Stanislaus County rate of 1896 was before this Court in the former rate case (192 U. S. 201), the Court said that,

"if the other counties should fix rates in such manner that, *taken as a whole*, the rates in the three counties would not insure an income of at least 6 per cent, as provided in the Act of 1885, the company would, of course, not be bound to accept such rates." (*Italics ours.*)

But, if the Court desires to go into the question, it is readily demonstrable from the record that the rate in Stanislaus County should be considerably less than the rate in Merced County, since by far the greater portion of complainant's system is in Merced County and not in Stanislaus County, and because a great part of the system both in Fresno and Merced Counties is not used nor useful to conveying water to Stanislaus County for irrigation. It is evident and is admitted by complainant (Rec. p. 1319) that the Outside and Dos Palos Canal systems lying entirely in Fresno and

Merced Counties are not useful to Stanislaus County, and, if so, neither are the small so-called outlet canals connecting the outside canal with the western parallel of the main canal. The Dos Palos Main and Branch canals are lateral distributing canals, irrigating lands in Fresno and Merced Counties only, and cannot by any possibility be useful to Stanislaus County.

While the reproduction cost of complainant's plant as given by its expert witness Goodwin in Exhibit 1 has been found by the Master and Court as being too high, nevertheless, subject to such finding of the Court, the said Exhibit 1 may be referred to as illustrating the comparative values of the parts of the system useful in each of the three counties. The following are the alleged reproduction costs of the system as set forth in Exhibit 1:

|   |              |
|---|--------------|
| <i>Fresno County</i> Headworks (Rec. p. 930)..... | \$ 84,732.23 |
| "      "      Dos Palos, Outside and Out-         |              |
| let canals .....                                  | \$156,531.74 |
| "      "      other canals .....                  | \$156,415.64 |
| <i>Merced County</i> (Rec. p. 977)                |              |
| Dos Palos, Outside and Outlet canals.....         | \$249,110.16 |
| Other canals and properties.....                  | \$275,065.44 |
| <i>Stanislaus County</i> (Rec. p. 1059)           |              |
| All works .. .....                                | \$ 40,363.92 |
| No part of the Dos Palos, Outside or Outlet       |              |
| canals are in Stanislaus County.                  |              |

The total of the above alleged cost of the entire system according to Exhibit 1 is \$962,219.13, and the total of the Dos Palos, Outside and Outlet canals, no part

of any of which is in Stanislaus County, is \$405,641.90, or 42 per cent of the entire system, thus leaving but 58 per cent of the entire system useful to Stanislaus County. Extending the calculation to the other two counties, we have the following percentages of usefulness of the entire system in each of the three counties, upon the basis that the works in Merced and Stanislaus are not useful to Fresno, that those in Stanislaus are not useful to Merced, that all in Fresno and Merced are useful to Merced, that all in Fresno are useful to Fresno, and that all in all the counties are useful to Stanislaus except the 42 per cent above stated, we have the following percentages of the usefulness of the entire system in the three counties:

|                       |             |
|-----------------------|-------------|
| In Fresno County..... | 41 per cent |
| “ Merced “ .....      | 96 “ “      |
| “ Stanislaus “ .....  | 58 “ “      |

So it is evident that the rate in Merced County should be higher than that in Stanislaus County.

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## X.

### Valuations by the Rate Fixing Boards.

THE BOARDS OF SUPERVISORS IN FIXING THE WATER RATES FOR 1907 DID NOT FIND THE TOTAL VALUE OF COMPLAINANT'S ENTIRE SYSTEM TO BE \$1,201,706.32, NOR THE COST OF OPERATING THE ENTIRE SYSTEM \$93,750.00. THE FINDINGS OF EACH BOARD WERE MADE WITH REFERENCE ONLY TO THAT PART OF THE SYSTEM THAT WAS TO BE USEFUL TO ITS PARTICULAR COUNTY.

At page 3 of their brief counsel state the valuations and annual expenses found respectively by the board

of supervisors of the three counties. Counsel then add up the same and give the sum of \$1,201,706.32 *as the total valuation* in the three counties, of complainant's system in 1907. This is incorrect and misleading. These valuations should not be added together, for the valuation by each board was not made as the valuation of that part of the system *that was* in each county, but was the valuation by each board of that part of the *entire system that was useful* to each county, and hence it is apparent that the valuations overlapped and that the sum of them would exceed the value of the entire system. The same is true as to the annual expense found by each board. Such should not be added together, as counsel has done, to make it appear that the annual expense of maintaining the entire system was \$93,750.00, since the annual expense found by each board was not as to that part of the system actually situated in the county, but of that portion of the entire system useful to each county.

In conclusion, we ask that the decree of the Circuit Court dismissing complainant's bill of complaint be affirmed by this Court.

Respectfully submitted,

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L. J. MADDUX,  
PARKER S. MADDUX,  
DENVER S. CHURCH,  
M. F. McCORMICK,  
H. S. SHAFFER,  
*Solicitors for Appellees.*



## APPENDIX.

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### CALIFORNIA IRRIGATION ACT, MARCH 12, 1885.

An Act to regulate and control the sale, rental, and distribution of appropriated water in this state, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the places of use.

The People of the State of California, represented in Senate and Assembly, do enact as follows:

Section 1. The use of all water now appropriated, or that may hereafter be appropriated, for irrigation, sale, rental, or distribution, is a public use, and the right to collect rates or compensation for use of such water is a franchise, and except when so furnished to any city, city and county, or town, or the inhabitants thereof, shall be regulated and controlled in the counties of this state by the several boards of supervisors thereof, in the manner prescribed in this Act.

Sec. 2. The several boards of supervisors of this state, on petition and notice as provided in section three of this Act, are hereby authorized and required to fix and regulate the maximum rates at which any person, company, association, or corporation, having or to have appropriated water for sale, rental, or distribution, in each of such counties, may and shall sell, rent, or distribute the same.

Sec. 3. Whenever a petition of not less than twenty-five inhabitants, who are taxpayers of any county of

this state, shall, in writing, petition the board of supervisors thereof, to be filed with the clerk of said board, to regulate and control the rates and compensation to be collected by any person, company, association, or corporation, for the sale, rental, or distribution of any appropriated water, to any of the inhabitants of such county, and shall in such petition specify the persons, companies, associations, or corporations, or any one or more of them, whose water rates are therein petitioned to be regulated or controlled, the clerk of such board shall immediately cause such petition, together with a notice of the time and place of hearing thereof, to be published in one or more newspapers published in such county; and if no newspaper be published therein, then shall cause copies of such petition and notice to be posted in not less than three public places in such counties, and such publication and notice shall be for not less than four weeks next before the hearing of said petition by said board; such notice to be attached to said petition shall specify a day of the next regular term of the session of the said board, not less than thirty days after the first publication or posting thereof, for the hearing of said petition, which shall impart notice to all such persons, companies, associations, and corporations, mentioned in such petition, and all persons interested in the matters of such petition and notice. Such Board may also cause citations to issue to any person or persons within such county, to attend and give evidence at the hearing of such petition, and may compel such attendance by attachment.

Sec. 4. At the hearing of said petition the Board of Supervisors shall estimate, as near as may be, the value of the canals, ditches, flumes, water chutes, and all other property actually used and useful to the appropriation and furnishing of such water, belonging to and possessed by each person, association, company, or corporation, whose franchise shall be so regulated and controlled; and shall in like manner estimate as to each of such persons, companies, associations, and corporations, their annual reasonable expenses, including the cost of repairs, management, and operating such works; and, for the purpose of such ascertainment, may require the attendance of persons to give evidence, and the production of papers, books, and accounts, and may compel the attendance of such persons, and the production of papers, books, and accounts, by attachments, if within their respective counties.

Sec. 5. In the regulation and control of such water rates for each of such persons, companies, associations, and corporations, such Board of Supervisors may establish different rates at which water may and shall be sold, rented or distributed, as the case may be; and may also establish different rates and compensation for such water so to be furnished for the several different uses, such as mining, irrigating, mechanical, manufacturing, and domestic, for which such water shall be supplied to such inhabitants, but such rates as to each class shall be equal and uniform. Said Boards of Supervisors, in fixing such rates, shall, as near as may be, so adjust them that the net annual receipts and profits thereof to the said persons, com-

panies, associations, and corporations so furnishing such water to such inhabitants shall be not less than six nor more than eighteen per cent upon the said value of the canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water of each of such persons, companies, associations, and corporations; but in estimating such net receipts and profits, the cost of any extensions, enlargements, or other permanent improvements of such water rights or waterworks shall not be included as part of the said expenses of management, repairs, and operating of such works, but when accomplished may and shall be included in the present cost and cash value of such work. In fixing said rates, within the limits aforesaid, at which water shall be so furnished as to each of such persons, companies, associations, and corporations, each of said Board of Supervisors may likewise take into estimation any and all other facts, circumstances, and conditions pertinent thereto, to the end and purpose that said rates shall be equal, reasonable, and just, both to such persons, companies, associations, and corporations, and to said inhabitants. The said rates, when so fixed by such Board, shall be binding and conclusive for not less than one year next after their establishment, and until established anew or abrogated by such Board of Supervisors, as hereinafter provided. And until such rates shall be so established, or after they shall have been abrogated by such Board of Supervisors, as in this Act provided, the actual rates established and collected by each of the persons, companies, associations, and corporations, and now furnishing, or that shall

hereafter furnish, appropriated waters for sale, rental, or distribution to the inhabitants of any of the counties of this State, shall be deemed and accepted as the legally established rates thereof.

Sec. 6. At any time after the establishment of such water rates by any Board of Supervisors of this State, the same may be established anew, or abrogated in whole or in part by such Board, to take effect not less than one year next after such first establishment, but subject to said limitation of one year, to take effect immediately in the following manner: Upon the written petition of inhabitants as hereinbefore provided, or upon the written petition of any of the persons, companies, associations, or corporations, the rates and compensations of whose appropriated waters have already been fixed and regulated, and are still subject to such regulation by any Board of Supervisors of this State, as in this Act provided; and upon the like publication or posting of such petition and notice, and for the like period of time as hereinbefore provided, such Board of Supervisors shall proceed anew, in the manner hereinbefore provided, to fix and establish the water rates for such person, company, association, or corporation, or any number of them, in the same manner as if such rates had not been previously established, and may, upon the petition of such inhabitants, but not otherwise, abrogate any and all existing rates theretofore established by such Board. All water rates, when fixed and established as herein provided, shall be in force and effect until established anew or abrogated, as provided in this Act.

Sec. 7. Each Board of Supervisors of this State, when fixing and establishing, or fixing and establishing anew, or abolishing any previously established water rates, as hereinbefore provided, shall cause a record to be made thereof in the records of such Board, and cause the same to be published or posted in the manner and for the time required for the publication or posting of said petitions and notices.

Sec. 8. Any and all persons, companies, associations, or corporations, furnishing for sale, rental, or distribution, any appropriated waters to the inhabitants of any county or counties of this State (other than to the inhabitants of any city, city and county, or town, therein), shall so sell, rent, or distribute such waters at rates not exceeding the established rates fixed and regulated therefor by the Boards of Supervisors of such counties, or as fixed and established by such person, company, association, or corporation, as provided in this Act.

Sec. 9. If any person, company, association, or corporation, whose water rates for any county of this State have been fixed and regulated by a Board of Supervisors, as in this Act provided, and while such rates are in force, shall collect for any appropriated water furnished to any inhabitant of such county water rates in excess of such established rates, shall be liable, in an action by any such inhabitant so aggrieved, to a recovery of the whole rate so collected, together with actual damages sustained by such inhabitant, with costs of suit.

Sec. 10. Every person, company, association, and corporation, having in any county in the State (other than in any city, city and county, or town, therein) appropriated waters for sale, rental, or distribution, to the inhabitants of such county, upon demand therefor, and tender in money, of such established water rates, shall be obliged to sell, rent, or distribute such water to such inhabitants at the established rates regulated and fixed therefor, as in this Act provided, whether so fixed by the Board of Supervisors or otherwise, to the extent of the actual supply of such appropriated waters of such person, company, association, or corporation, for such purposes. If any person, company, association, or corporation, having water for such use, shall refuse compliance with such demand, or shall neglect, for the period of five days after such demand, to comply therewith to the extent of his or its reasonable ability so to do, shall be liable in damages to the extent of the actual injury sustained by the person or party making such demand and tender, to be recovered, with costs.

Sec. 11. Whenever any person, company, association, or corporation, shall have acquired the right to appropriated water, or shall have acquired the right to appropriate such water in this State, such person, company, association, or corporation may proceed to condemn the lands and premises necessary to such right of way, under the provisions of title seven, of part third, of the Code of Civil Procedure of this State, and amendments made and to be made thereto, and all the provisions of said

Code, so far as the same can be made applicable, relating to the condemnation and taking of property for public uses, shall be applicable to the provisions of this Act.

Sec. 12. This Act shall take effect and be in force from and after its passage.



